No. 92-522

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH GARDNER, ET AL.,

Appellants,

vs.

ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a redistricting plan violates the Voting Rights Act, 42 U.S.C. §§ 1973, et seq., when, as a result of that redistricting plan, politically cohesive African-American communities are split into diverse legislative districts, the portions of those formerly discrete African-American communities are then jointed with other fractions of other African-American communities until a supermajority (65% or greater) African-American population is merged with traditionally powerful, politically active and unified white communities on Chicago's south side, where victory in the primary election is tantamount to victory in the general election due to one-party dominance.

2. Whether the three-judge court, when passing on the legality of the

redistricting plan for the Illinois General Assembly, properly refused to consider election results from the March 17, 1992 primary elections, when the election results in four of the districts challenged by appellants demonstrated appellants' contention that the redistricting plan--which splintered existing African-American communities, combined those fragments of existing communities with fragments of rival African-American communities and placed those pieces of African-American communities with dominant, unified white communities--would impair the ability of African-Americans to elect candidates of choice, particularly in primary elections.

3. Whether the redistricting plan for the Illinois General Assembly violates the Voting Rights Act by failing to create

a representative district on the northwest side of the City of Chicago with a 50% Hispanic population, when such a district could be created without impairing the effectiveness of adjoining supermajority Hispanic districts or frustrating any expressed state interest or intent served by the challenged redistricting plan and such a district configuration would maximize Hispanic political empowerment and the ability of Hispanics to elect candidates of that community's choice.

4. Whether the redistricting plan for the Illinois General Assembly violates the Voting Rights Act by failing to create districts in cities throughout Illinois which maximize minority populations in those districts (albeit less than a majority of those districts' population), where significant numbers of minorities

reside in those urban communities and election data demonstrate an ability of those minorities to choose the candidate of those minorities' choice from between the partisan preferences of the white population, while the district configurations actually employed deny the minorities the ability to "swing" elections from one partisan choice of the white population to the other.

5. Whether the redistricting plan for the Illinois General Assembly also violates the Fourteenth and the Fifteenth Amendments to the United States Constitution when the impact of the redistricting plan ultimately adopted by the state was the subject of briefs, and testimony (both through "fact" or occurrence witnesses and expert witnesses) and no expressed state interest was served

by selecting the redistricting plan ultimately adopted over alternate proposals which did not visit the discriminatory harms upon minorities caused by the plan adopted.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

The Illinois Legislative Redistricting Commission ("Commission") and its Republican majority members, all appellees herein[1], initiated this action

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[1]The original plaintiffs, in addition to the Commission, included Al Jourdan, Frank Watson, Robert Churchill, Gene Hoffman and Dallas Ingemunson. In the District Court, David Reed also sought to join the suit as an additional party plaintiff. He is not an appellee before this Court, as no relief was sought against him at the trial on the Gardner counterclaim. Illinois Secretary of State George Ryan and the Illinois State Board of Elections were joined as counterdefendants in the Gardner counterclaim, and they are appellees in this Court. With the exception of Mr. Reed, these parties, collectively, will be referred to as the appellees.

on October 4, 1991, in the United States District Court for the Northern District of Illinois ("District Court") seeking a declaration that the redistricting plan approved by the Commission on that same day complied with relevant federal and state laws. The action was initiated against Gary J. LaPaille, Chairman of the Illinois State Democratic Central Commmittee, the Democratic members of the Commission[2], an Hispanic State Senator and a political activist apparently named as a defendant because he is an African-American who had advocated a redistricting scheme different than the one adopted by

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[2]Jim McPike, Thomas Lyons, Eartharin Cousin and Jerome Joyce.

the Commission. Eventually, appellants, Joseph Gardner, et al.,[3] were named as defendants along with many others.[4]

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[3]The Gardner defendants-counter-plaintiffs, appellants in this Court, included Joseph Gardner, Lovana Jones, Dan Barreiro, William Shepard, Jr., John Lee Johnson, Gwendolyn Scott, Laura Barth, Warren Dorris, Marvin French, Jayme Cain, Percy Conway, Joseph Belman, Luis Albarasin, Crotis Teague, Jr., Henry Landrau, Carolyn Toney, Fred Smith, Charlie Wilson, Jr., and Bobby E. Thompson.

[4]These defendants, some of whom were counter-plaintiffs, included Henry Martinez, Roberto Gonzalez, Anita Garcia, Maria A. Morales, Marta Caldero, Consuelo Zemaitis, J. Richard Mota, Dave Duran, Teresa Fraga Orosco, Beverly Area Planning Association, William Gainer, Mt. Grenwood Civic Association, Curt Mentzer, Paula Derback, Sharon Hanlon, Thomas C. Hynes, Jeremiah Joyce, James Keane, Thaddeus Lechowicz, Robert J. Bugielski, Polish American Congress, Inc., Rebecca W. Owens, Gay E. Bruhn, Mary Finger, Marisa L. L'Heureux, Carole Travis, Wilfred G. Stewart, Mary Ellen Smyth, Sara Thompson, Mary Mari Anna Murphy, Ava George, Sandra M. Scott, Illinois Attorney General Roland W. Burris, State Senator Miguel del Valle

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(an original defendant), Bruce Crosby (an original defendant), Mervin A. Mendez, Matias Rico, Heimelinda Ortega, The Task Force for Black Political Empowerment, Sen. Howard Brookins, Sen. Earlean Collins, Sen. Alice Palmer, Association for Political and Economic Influence, Timuel Black and Robert Starks. Of these defendants, Mervin Mendez, Metias Rico and Heimelinda Ortega also appealed the decision of the three-judge court.

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CITATIONS TO OPINIONS BELOW

This case was filed on October 4, 1991 as an action for declaratory relief. No final redistricting plan emerged from the Commission and the Illinois Supreme

Court, however, until January 10, 1992, and the action before the District Court remained essentially dormant until a final redistricting plan was approved by the state system. Thereafter, the matter proceeded to trial before the three-judge District Court on the appellants' and others' challenge to the legality of the final state redistricting plan, and on March 11, 1992, the District Court issued its opinion finding the redistricting plan valid under federal law. Illinois Legislative Redistricting Commission v. Gary LaPaille, et al., 786 F. Supp. 704 (N.D. Ill. 1992). The opinion is attached to this Jurisdictional Statement as Appendix 1-58. On June 11, 1992, the District Court issued its order denying the appellants' motion for a new trial. Illinois Legislative Redistricting

Commission v. Gary LaPaille, et al., 792 F. Supp. 1110 (N.D. Ill. 1992). On June 15, 1992, the District Court's order was docketed. The order is attached to this Jurisdictional Statement as Appendix 59-67.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1253. The three-judge United States District Court for the Northern District of Illinois entered an Order on March 11, 1992, and pursuant to United States Supreme Court Rule 18.3 and 28 U.S.C. §2101, the present Jurisdictional Statement is timely and appropriate for this Court's consideration. On March 26, 1992, the appellants moved the District Court for a new trial, and the District Court denied

that motion on June 11, 1992 (docketed June 15, 1992).

The District Court had jurisdiction to consider the case pursuant to 28 U.S.C. §§ 1331, 1334 and 2284.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment (XIV)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [U.S. Const. amend. XIV.]

U.S. Const., Amendment (XV)

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.
[U.S. Const. amend. XV.]

42 U.S.C. §1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation.

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS §1973(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section

establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. [42 U.S.C §1973 (1982).]

STATEMENT OF THE CASE

On October 4, 1991, the Illinois Legislative Redistricting Commission ("Commission"), on a 5-4 vote along party lines, approved a redistricting plan for the Illinois General Assembly. That same day, the Commission and its five Republican members brought a declaratory judgment action in the District Court, seeking a declaration that the redistricting plan complied with the United States Constitution, the Voting Rights Act and the Illinois Constitution of 1970, as amended.

Over the next three months, the federal court litigation remained essentially dormant, as the legality of the Commission's October 4 redistricting

plan was tested, on state law bases, before the Illinois Supreme Court.[5] On December 13, 1991, the Illinois Supreme Court refused to approve the October 4 redistricting plan and remanded the matter to the Commission for further review. People ex rel. Burris v. Ryan, 147 Ill.2d 270, 588 N.E.2d 1023 (1992). The Commission held hearings from January 4 through January 6, 1992, and passed a modified redistricting plan on January 6,

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[5] Principally, the litigation in federal court during the time the Illinois Supreme Court considered the redistricting plan's legality under the Illinois Constitution of 1970 related to questions of removal of state court proceedings to the district court, joinder of additional and necessary parties, attempts by appellees to enjoin proceedings mandated by the Illinois Supreme Court and the standing of the original plaintiffs to seek declaratory relief. Once final approval of redistricting plan was given by the Illinois Supreme Court, the federal court litigation proceeded to the merits of claims of violations of federal law caused by that plan.

1992. On January 10, 1992, the Illinois Supreme Court approved the newly modified redistricting plan, and it issued its opinion on January 14, 1992. (People ex rel. Burris v. Ryan, 147 Ill.2d 270, 588 N.E.2d 1033 (1992).

On January 17, 1992, appellants filed their counterclaim to the appellees' third amended complaint for declaratory judgment, asserting challenges under federal law to the redistricting plan approved by the Illinois Supreme Court. Appellants were permitted to file an amended counterclaim on February 3, 1992.

The amended counterclaim, lying in four counts, asserted that certain districts as configured in the approved redistricting plan violated the rights of appellants under the Voting Rights Act and the Fourteenth and Fifteenth Amendments to

the United States Constitution, in essence, denying African-Americans and Hispanics a fair opportunity to elect candidates of their choice. A five-day trial was held before the three-judge court, and, as part of that trial, appellants filed with the District Court the evidence presented before the Illinois Supreme Court and the Commission in connection with the January 1992 hearing conducted by the Commission. Thus, the evidence before the District Court consisted largely of unrebutted affidavits, declarations and documentary exhibits. Many of these affidavits and declarations contained opinions and statements from persons, elected officials and others, who have knowledge of the political realities of life in Chicago and other areas around the State of Illinois.

In addition to the evidence presented to the Commission and the Illinois Supreme Court, the three-judge court received affidavits from expert and anecdotal witnesses, and it heard then in-court testimony of three expert witnesses, Mr. Kimball Brace (appellants' expert), Dr. G. Gordon Henderson (the Mendez appellants' expert) and Professor Richard Engstrom (appellees' expert).

The evidence presented to the Commission and re-submitted to the court illustrated the past and present effects of discrimination in the State of Illinois. For example, the evidence, including census data, exposed the great disparity between whites and non-whites in areas such as: (1) persons who hold elective office, (2) income levels, (3) persons living below the poverty level,

(4) persons who own their own homes, (5) persons who live in lower quality housing stock, (6) education levels, (7) the number of white teachers relative to non-white enrollment, (8) employment, and (9) infant mortality rates.

Appellants also presented evidence that certain districts on the South Side of Chicago were configured in such a way as to disrupt and fracture existing communities of interest among African-Americans, combine the fragments of those communities with fragments of other, potentially rival African-American communities and pit those combined fragments of rival African-American communities against strong, politically cohesive and effective white political organizations. In addition, appellants offered expert testimony tending to

demonstrate that in urban areas in Illinois outside Chicago, minority populations were sufficiently large and partisan differences among whites sufficiently sharp to permit districts to be drawn in such a way to enable the minority population, if unified, to elect its candidate of choice between the partisan preferences of the white population and "swing" elections from one candidate to another. In this regard, appellants' expert relied upon historical election data and accepted demographic and statistical techniques to demonstrate that in past elections the vote totals of minorities in various urban areas were sufficient in specific election contests to overcome the white population's preference for one candidate over another and, in fact, had been outcome-

determinative in certain elections in which the minority population's preferred candidate was not the candidate of choice among white voters.

Appellees, on the other hand, offered raw numbers of percentages of population figures and electoral results as to the challenged districts in support of their contention that the redistricting plan as configured met the concerns advanced by appellants. Appellees' expert also questioned the reliability and statistical validity of Mr. Brace's analysis of election and population data as it related to Illinois urban areas outside of Chicago and the ability of the minority populations in those areas to "swing" elections.

The District Court issued its opinion on March 11, 1992, upholding the

redistricting plan as complying with the Voting Rights Act and the 14th and 15th Amendments to the United States Constitution, and holding that the plan provides a meaningful opportunity for minority voters to elect candidates of their choice.

On March 17, 1992, subsequent to the close of proofs and the issuance of the District Court's opinion, the State of Illinois conducted primary elections, including primary elections for the Illinois General Assembly. In various of those elections, including supermajority African-American districts in Chicago challenged by appellants in the District Court as not being effective supermajority districts due to the disparate fragments of rival African-American communities placed in primary contests with unified

and powerful white communities, the election returns confirmed appellants' claim that African-Americans would not have a fair opportunity to elect candidates of their choice, as white candidates secured the Democratic Party nominations even though the population of each district was at least 65% African-American. Based on these returns, appellants brought a motion for a new trial as to those challenged districts. The District Court denied the appellants' motion for a new trial on June 11, 1992. The District Court found that the election returns did "not sufficiently cast doubt upon the trial result so as to warrant a new trial." LaPaille, 792 F.Supp. at 1112. (App. 64). The District Court's June 11, 1992 Opinion was docketed on June 15, 1992.

ARGUMENT

THE QUESTION IS SUBSTANTIAL, AS THE DISTRICT COURT'S DECISIONS CONFLICT WITH THE DECISIONS OF THIS COURT.

In its March 11, 1992, Opinion, the District Court held that the redistricting plan for the Illinois General Assembly complied with the Voting Rights Act and the 14th and 15th Amendments to the Constitution. The Court stated, "The Plan provides a meaningful opportunity for minority voters to elect candidates of choice in areas where this opportunity is warranted by their population numbers, and does not intentionally discriminate along racial lines." LaPaille, 786 F. Supp. at 717 (App. 56).

Appellants respectfully submit that the District Court's Opinion is incorrect, is not supported by the Record and conflicts with the decisions of this

Court. The District Court in some instances in its Opinion disavowed the evidence presented by appellants and at other times completely disregarded the evidence. The resulting decision is entirely inconsistent with this Court's precedent and Congress' express mandate.

Congress has directed the courts to review the "totality of circumstances" when determining whether racial or language minority members have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). This Court, in Thornburg v. Gingles, 478 U.S. 30, 43 (1985), embraced and adopted the "totality of circumstances" analysis.

This Court, subsequent to Gingles, made clear that §2(b) of the voting Rights

Act was intended to apply to "influence" districts as well as single member districts in which the protected minority population is a majority of the district population. In Chisom v. Roember, _____ U.S. _____, 115 L. Ed.2d 348, 111 S. Ct. 2354 (1991), this Court construed §2 of the Voting Rights Act in connection with judicial elections, and in its decision, this Court recognized that the Act applies when members of a minority group have the ability to "influence" elections. 111 S. Ct. at 2365, fn. 24.

In this same vein, the United States District Court for the Northern District of Ohio in Armour v. Ohio, 775 F. Supp. 1044 (N.D. Ohio 1991), recognized that a voting rights claim can be asserted as it relates to a district in which a minority group constitutes less than a majority of

the residents of the district if the district configuration serves to dilute a minority group's voting strength.

Where a court considers voting dilution claims under the Voting Rights Act, as applied to "influence" districts, or majority-minority districts, it must consider the totality of circumstances on the basis of objective factors, including the non-exhaustive list of factors set forth in Gingles. The District Court here, however, failed to consider the "totality of circumstances" in reaching its decision.

On this basis alone, this Court's review is warranted. The District Court merely recites some of the objective factors along with electoral data which was presented by appellants in relation to their challenges to super-majority

districts as configured in the redistricting plan on the South Side of Chicago, with no analysis whatsoever. The District Court simply stated that the appellees' expert presented election results that had bearing on the challenged districts and that the opinion of the appellees' expert was "better reasoned and better supported by the record than Brace's opinion [the appellants' expert] to the extent there are conflicts between the two experts' testimony." LaPaille, 786 F. Supp. at 713. (App. 34). That is the extent of the District Court's analysis of the evidence proffered regarding super-majority minority districts.

The District Court never acknowledged for example, that the voting trends in terms of registration and turnout is low

and turning lower in the African-American communities in Chicago. Nor did it acknowledge the probability of white candidates supported by white bloc voting to win Democratic primaries in these districts, which in fact occurred in the March 1992 Democratic Primary. In Chicago, moreover, victory in the Democratic primary is tantamount to victory in the general election, as the City is dominated by one political party. Finally, appellees presented no evidence regarding the "totality of circumstances" or so-called Zimmer factors; yet the District Court nevertheless found that the supermajority African-American districts under the plan provided African-Americans a fair opportunity to elect candidates of their choice.

This Court's precedent and Congress' mandate in the Voting Rights Act call for a meaningful examination of the "totality of circumstances" surrounding an electoral device or plan. More is required than a mechanical application of a bright-line test of whether minority population exceeds 65% of the total district population. Otherwise, the statute and this Court's precedent would direct the inquiry stops when a desired population figure is achieved.

In the City of Chicago, where African-Americans experience differing economic circumstances, differing political agendas in local issues, differing local political organizations and, at the local level, differing political communities of interest, it is inappropriate to disregard those

differences, engage in the incorrect assumption that all African-Americans and their communities are alike and force rival political organizations to compete for the African-American vote in primary elections, all while a substantial white population with notoriously powerful political organizations coalesces behind one candidate. As a matter of theory, the plan adopted by the Commission is of dubious validity: projected against the backdrop of political data from past elections, the untenability of the simplistic "65% is always enough" approach was exposed, but, most egregiously, the District Court refused to reconsider its opinion when the very first elections run under the redistricting plan demonstrated the fallacy of the Commission's assumption that political realities could be

disregarded so long as desired population quotas were achieved.

In terms of the "influence" claims, the District Court refused to apply the logic of Chisom or the holding of Armour. The same situation exists in Illinois under the current redistricting plan as it did in Ohio with regard to districts that contain less than a majority of minorities: there are areas where the white population is fairly evenly divided on partisan grounds and the minority population sufficiently large and cohesive to "swing" or "influence" elections and elect the candidate of the minority population's choice from between the candidates offered by the white population. That ability, if respected by the redistricting plan, will lead to minority political empowerment, as the

competing partisan candidates chosen from the white population will seek to secure minority support by addressing and advancing the minority population's political goals.

At trial, appellants demonstrated that a 50% Hispanic House District, House District 33, could be created on the Northwest side of Chicago which would allow Hispanic voters to elect candidates of their choice or be able to "influence" elections between competing non-Hispanic groups. Appellants proposed that this be done by reducing the Hispanic population in the 3rd House District (71.3% Hispanic) and the 4th House District (70.5% Hispanic), while maintaining their super-majority minority status. All the experts at trial agreed that 65% Hispanic populations were sufficient to create

"viable" districts in House Districts 3 and 4, and there was nothing about the proposed configuration of House District 33 which threatened to impair the viability of those adjoining supermajority Hispanic districts[6].

The "influence" or "swing" district analysis as set out by the Armour court applies with equal force to the downstate districts identified by appellants as well. These districts were challenged, like in Armour, on the basis that the districts were configured in such a way that the voting strength of the minority communities was illegally reduced even though those minority communities did not

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[6] The Mendez appellants are also expected to challenge and discuss the court's decision as it relates to District 33. By order of Court granting their motion for extension, the Mendez Jurisdictional Statement will be filed in early November, 1992.

constitute a majority in a single district. Rejecting appellants' claims, the District Court found, among other things, that these claims would require a substantial amount of speculation regarding the groups' ability to form alliances with other groups to exercise voting control.

The evidence adduced at trial, however, indicates differently. The evidence illustrated that minority groups in smaller urban communities unify together in political and social orientations in support of candidates and various other civic issues. The election data established further that the plurality for specific candidates generated in precincts with a majority minority population were sufficient in specific elections to overcome the

plurality vote support generated among the white precincts for the candidate opposed by the minority population and that, in other elections, the minority vote demonstrated the potential to "swing" elections, although the minority preferred candidate was also preferred, slightly, by the white precincts. Had the minority population unified behind the other candidate, the election result would have been different.

Finally, the District Court, in a conclusory manner, stated that appellants failed to prove a discriminatory effect and motive as required under their 14th and 15th Amendment claims. Although the District Court recognized that appellants relied upon the same evidence which was introduced regarding the Voting Rights Act claims, it did not identify how

appellants' proof failed to satisfy their burden of proof under the constitutional claims. The discriminatory motive was shown through the uncontested evidence that the Commission was informed of the discriminatory effect of its proposed redistricting plan before it was adopted and the absence of any non-discriminatory, valid state purpose or interest which the redistricting plan sought to advance.

CONCLUSION

For these reasons, this case should stand for briefing and oral argument on the merits.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, ET. AL., Plaintiffs, VS. GARY J. LaPAILLE, ET AL., Defendants.	
JOSEPH GARDNER, LOVANA JONES, DAN BARREIRO, WILLIAM SHEPHARD, JR., JOHN LEE JOHNSON, GWENDOLYN SCOTT, LAURA BARTH, WARREN DORRIS, MARVIN FRENCH, JAYME CAIN, PERCY CONWAY, JOSEPH BELMAN, LUIS ALBARASIN, CROTIS TEAGUE, JR., HENRY LANDRAU, CAROLYN TONEY, FRED SMITH, CHARLIE WILSON, JR., and BOBBY E. THOMPSON, on their own behalf and on behalf of all others similarly situated,	No. 91 C 6318

Counter-Plaintiffs,)
)
VS.)
)
ILLINOIS LEGISLATIVE)
REDISTRICTING)
COMMISSION, AL JOURDAN,)
FRANK WATSON, ROBERT)
CHURCHILL, GENE)
HOFFMAN, DALLAS)
INGEMUNSON, GEORGE)
H. RYAN, sued in his)
official capacity as)
ILLINOIS SECRETARY)
OF STATE, and)
ILLINOIS BOARD OF)
ELECTIONS,)
)
Counter-Defendants.)
)

O R D E R

Before KANNE, Circuit Judge, NORGLE, District Judge, and ZAGEL, District Judge

NORGLE, District Judge.

Before the court are the plaintiff/counter-defendants' third amended complaint seeking a declaratory judgment upholding the validity of a redistricting plan for the Illinois General Assembly approved by the Illinois

Supreme Court on January 14, 1992, and counterclaims by two sets of defendant/counter-plaintiffs challenging parts of that redistricting plan. A trial was conducted on February 4 through 7, and 11, 1992, after which the parties filed proposed findings of fact and conclusions of law. Also pending before the court is the plaintiff/counter-defendants' motion for summary judgment. For reasons that follow, judgment is entered for the plaintiff\counter-defendants and against the defendant\counter-plaintiffs on all claims.

BACKGROUND

The current claims are the latest arising from efforts to redistrict the Illinois General Assembly following the 1990 federal census. The Illinois Legislative Redistricting Commission and

its Republican majority members (the "Redistricting Commission") filed the first complaint on October 4, 1991 in this court, seeking a declaration that the redistricting plan passed by the commission that day complied with relevant federal and state laws.[1] A parallel case, challenging the redistricting plan, was filed by the Illinois Attorney General on October 11, 1991 in the Illinois Supreme Court. That court remanded the redistricting plan to the Redistricting Commission on December 13, 1991 for hearings and consideration of alternative

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[1]Additional background information on the Redistricting Commission and this litigation can be found in this court's prior opinion allowing the plaintiffs to file a third amended complaint. Illinois Legis. Redist. Comm'n v. LaPaille, No. 91 C 6318, 1991 U.S. Dist. LEXIS 19369 (N.D. Ill. Dec. 30, 1991).

plans. People ex rel. Burris v. Ryan, No. 72662, 1991 Ill. LEXIS 123 (Ill. S. Ct. Dec. 13, 1991). The commission held hearings from January 4 through 6, 1992, and passed a modified redistricting plan on January 6, 1992. The Illinois Supreme Court approved the modified plan on January 10, 1992 and issued an opinion four days later explaining its ruling. People ex rel. Burris v. Ryan, No. 72662, 1992 Ill. LEXIS 1 (Ill. S. Ct. Jan. 14, 1992).[2]

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[2]On February 24, 1992, the Illinois Supreme Court denied nine motions in the case, including motions to recall the court's mandate and for rehearing filed by several parties to both that case and the proceedings here: Illinois Attorney General Roland W. Burris, a group of African-American voters designated as the Gardner counter-plaintiffs here, and several of the Hispanic voters designated as the Mendez counter-plaintiffs here.

The court-approved plan, which was supported by the Republican majority on the Redistricting Commission, created eighteen state House of Representatives districts and eight state Senate districts with African-American "super majorities" (at least 65% of the population). The competing plan backed by the Commission's Democratic members provided for one less African-American super-majority House district and the same number of African-American super-majority Senate districts. Both the court-approved plan and its Democratic-backed alternative provided for four Hispanic super-majority districts in the House and two in the Senate.

Although the Illinois Supreme Court approved the Redistricting Commission's modified plan without change, the Commission, joined by African-American

voter David Reed ("Reed"), continued to press its declaratory judgment action in this court.[3]

Additionally, a group of African-American voters (the "Gardner counter-plaintiffs"), who had intervened in the proceedings before the Illinois Supreme Court and were named as defendants in the Redistricting Commission's third amended complaint, filed a counterclaim on January 17, 1992. The Gardner counterclaim included three counts, two of which were dismissed prior to the hearing.[4] The

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[3]Reed was added as a plaintiff in the Redistricting Commission's third amended complaint. On January 13, 1992, the day before the modified plan was approved by the Illinois Supreme Court, the Commission was granted leave to amend its third amended complaint to incorporate the modified plan.

[4]The dismissed counts were Count II, alleging partisan gerrymandering in violation of the Gardner counter-plaintiffs' 14th Amendment equal

remaining Count I alleged two types of violations of the Voting Rights Act, 42 U.S.C. §1973 et seq. First, it alleged the denial of African-American voters' "fair opportunity" to elect candidates of their choice in eight state House of Representatives districts (5, 6, 21, 23, 24, 26, 27 and 28) and three state Senate districts (3, 12 and 14) on the south side of Chicago, each of which have 65% or greater African-American populations. Second, it alleged diminution of minority voters' influence through "fracturing" of minority communities on the northwest side of Chicago (House District 33), where a 50% Hispanic district is possible, and in

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protection rights and 15th Amendment voting rights, and Count III, alleging violation of their 14th Amendment due process rights. Illinois Legis. Redist. Comm'n, No. 91 C 6318, 1992 U.S. Dist. LEXIS 818 (N.D. Ill. Jan 24, 1992).

several areas with minority populations too small to constitute a majority in a district -- Leyden Township (House Districts 77 and 78), Waukegan (House Districts 59, 61 and 62), Aurora (House Districts 42 and 94), Rock Island-Quad Cities (House Districts 71 and 72) and Springfield (House Districts 99 and 100).

The Gardner counter-plaintiffs were granted leave on February 4, 1992 to file an amended counterclaim which added a "fracturing" claim for the Champaign-Urbana area (House Districts 103 and 104) to Count I and restated the previously dismissed Counts II and III.[5] The amended counterclaim also added Count IV alleging that the Redistricting Commission adopted

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[5]Counts II and III of the amended Gardner counterclaim are dismissed for the reasons set forth int his court's January 24, 1992 order pertaining the same counts in the initial counterclaim.

its modified plan with the intention of discriminating against African-American and Hispanic voters in violation of these voters' 14th Amendment equal protection rights and their 15th Amendment voting rights.

A group of Hispanic voters (the "Mendez counter-plaintiffs"), some of whom had intervened in the Illinois Supreme Court case, filed a counterclaim on January 24, 1992, joining the "fracturing" claims of the Gardner parties with regard to the Hispanic communities on the northwest side of Chicago. This counterclaim also added "fracturing" claims for Hispanic communities on the southeast side of Chicago, in Leyden and Proviso Townships, Aurora and Waukegan. The Mendez parties, however, moved on January 31, 1992 to dismiss these latter

claims voluntarily under Federal Rule of Civil Procedure 41(a)(2), leaving only their northwest side "fracturing" claims at issue.[6]

The five-day trial was conducted in a manner similar to that utilized in other redistricting cases, see, e.g., Hastert v. State Bd. of Elections, 777 F.Supp. 634, 639-40 (N.D. Ill. 1991) (three-judge

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[6]The Mendez counter-plaintiffs' motion to dismiss without prejudice (styled as a "motion to withdraw portions of counterclaim") their voting Rights Act "fracturing" or vote dilution claims with regard to the southeast side of Chicago, Leyden and proviso Townships, Aurora and Waukegan was taken under advisement on January 31, 1992. The court now dismisses those claims with prejudice pursuant to Fed. R. Civ. P. 41(a)(2). The defendants would suffer legal prejudice if the Mendez parties were allowed to refile those claims and the defendants were forced to endure the costs of another trial on similar issues to those which have already been tried. See Ratkovich ex rel. Ratkovich v. Smith Kline, 951 F.2d 155, 157-58 (7th Cir. 1991).

panel) (and cases cited therein), with evidence submitted in the form of affidavits, depositions, maps, statistical data, and the testimony of three expert witnesses under direct and cross examination. Afterward, proposed findings of fact and conclusions of law, and post-trial briefs, were filed by the plaintiff\counter-defendants Redistricting Commission and Reed, the Gardner defendant\counter-plaintiffs, the Mendez defendant\counter-plaintiffs, and a group of African-American defendants who have joined together as the Task Force for Black Political Empowerment (the "Task Force").

DISCUSSION

I. Res Judicata and Rooker-Feldman

The Redistricting Commission and Reed argued in their January 21, 1992 motion

that the Gardner counterclaims were barred by the doctrine of res judicata because the Gardner parties either raised, or could have raised, the same claims before the Illinois Supreme Court. The Commission also contended that the Gardner parties are attempting to appeal the Illinois court's ruling to this court, which deprives this court of subject matter jurisdiction under the Rooker-Feldman doctrine. See District of Columbia Ct. of Apps. v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923). The court's January 24 opinion, dismissing Counts II and III of the counterclaim, reserved ruling on the res judicata and Rooker-Feldman issues. Illinois Legis. Redist. Comm'n, No. 91 C 6318, 1992 U.S. Dist. LEXIS 818 (N.D. Ill. Jan. 24, 1992).

The Commission also raised these issues with regard to the Mendez counterclaim in a January 31, 1992 motion, and has continued to press these issues in its post-trial brief regarding both the Gardner and Mendez counterclaims.

State court judgments must be given "the same full faith and credit" -- including preclusive effect -- in federal court as they would receive in the courts of the rendering state. 28 U.S.C. §1738; Pirela v. Village of North Aurora, 935 F.2d 909, 911 (7th Cir.), cert. denied, 112 S.Ct. 587 (1991). "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on

judicial action by minimizing the possibility of inconsistent decisions." Montana v. U.S., 440 U.S. 147, 153-54 (1979).

Under Illinois law, the doctrine of res judicata,or claim preclusion, provides that "a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." Simcox v. Simcox, 131 Ill. 2d 491, 497, 546 N.E.2d 609, 611 (1989). Res judicata applies to claims that were, or could have been, raised in a prior action. LaSalle Nat'l Bank v. County of DuPage, 856 F.2d 925, 930-31 (7th Cir. 1988) (discussing Illinois law), cert. denied, 489 U.S. 1081 (1989). Similarly, collateral estoppel, or issue preclusion, "provides that an

issue which has been addressed by a court of competent jurisdiction cannot be relitigated in a later action between the same parties or their privies...." Simcox, 131 Ill. 2d at 496, 546 N.E.2d at 611. The Redistricting Commission and Reed, as the parties asserting res judicata, have "the burden of showing with clarity and certainty what was determined by the prior judgment." LaSalle Nat'l Bank, 856 F.2d at 930.

The Illinois Supreme Court's four-page January 14 opinion explained that it approved the Redistricting Commission's modified plan on January 10 after considering four types of requirements: (1) the Illinois constitutional "equal population" requirement, (2) various Illinois and federal constitutional requirements, and federal statutory

requirements regarding minority representation, "i.e., racial, ethnic and gender," (3) compliance with the Illinois Constitutional "compactness" requirement, and (4) "all legal requirements regarding political fairness." People ex rel. Burris, slip op. at 3-4 (January 14, 1992). That court found that the Commission's modified plan "meets all four requirements" without any further explanation of what federal constitutional and statutory requirements had been applied. Id. at 4. The only constitutional or statutory standard specified in the opinion was that for reviewing the Commission's work set forth in the Illinois Constitution; the modified plan was "valid unless it is against the manifest weight of the evidence." Id. at 3 (citing Ill. Const. of 1970, art. IV, §

3(b)). There were no specific findings as to any of the four general requirements listed in the opinion.

The "thrust" of the Illinois Supreme Court's opinion was its concern for the interest of the state's voters in holding elections on time. Id. at 2. This concern and a lack of resources or time, that court wrote, prevented it "from competently drawing a map that would take into account the diverse interests at stake in this litigation." Id.

The constraints which the Illinois Supreme Court expressed are understandable. Nonetheless, under the circumstances, this court cannot find that the Illinois Supreme Court's ruling precludes the federal claims at issue. It is unclear whether that court considered or made any findings with regard to the

Voting Rights Act, the 14th Amendment, or the 15th Amendment. The Redistricting Commission and Reed have failed to meet their burden to show specifically what that ruling determined. Res judicata, therefore, cannot be applied.

The Redistricting Commission and Reed also contend that the Rooker-Feldman doctrine bars this court's review of the merits of the Gardner and Mendez parties' counterclaims. Under that doctrine, federal review of state court decisions is only available in the Supreme Court, except in habeas corpus cases. See Lynk v. LaPorte Super Ct. No. 2, 789 F.2d 554, 563 (7th Cir. 1986) (citing 28 U.S.C. § 1257; Feldman, 460 U.S. 462; Rooker, 263 U.S. 413, 416; and other cases). A federal district court, however, has subject matter jurisdiction over a federal

constitutional challenge to a state law when review of a final state court decision is not necessarily required. Feldman, 460 U.S. at 482 n.16, 486; Keene Corp. v. Cass, 908 F.2d 293, 296-297 (8th Cir. 1990).

The counterclaims here involve both federal constitutional and Voting Rights Act challenges to the modified plan approved by both the Redistricting Commission and the Illinois Supreme Court. Under the Illinois Constitution, once a plan is approved by the Commission and filed with the Illinois Secretary of State, the plan "shall have the force and effect of law...." Ill. Const. of 1970, art. IV, § 3(b). These steps took place on October 4, 1991. The Gardner and Mendez parties are therefore in effect challenging the validity of a state law.

For purposes of determining applicability of the Rooker-Feldman doctrine, the court sees no reason to distinguish between the federal Constitution and the Voting Rights Act; both are vehicles for challenging state laws. Moreover, as already discussed, it is not clear what findings were made by the Illinois Supreme Court regarding federal law, or that that court made any findings at all with regard to the merits of the counterclaims before this court. Therefore, our consideration of the counterclaims will not involve review of the Illinois Supreme Court's ruling. Accordingly, the Rooker-Feldman doctrine does not deprive this court of jurisdiction over the counterclaims.

II. Voting Rights Act

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, prohibits redistricting

plans, as well as other laws or practices, which have the effect of denying or abridging minority voters' ability to participate in electoral contests. Chisom v. Roemer, 111 S.Ct. 2354, 2363-64 (1991). An allegedly discriminatory effect is evaluated based on the "totality of the circumstances," with no requirement that the challenging parties show that the effect was intentional. Id.

The Supreme Court in Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986), set forth three preconditions for challenges to multi-member legislative districts under §2 of the Voting Rights Act, 42 U.S.C. § 1973, which appear to be applicable to § 2 challenges to single-member districting plans. See Hastert, 777 F.Supp. at 651-55. Those preconditions, which must be met before

the "totality of the circumstances" can be addressed, are (1) that the challenging minority group be large enough to constitute a majority in a single-member district, (2) that the group is politically cohesive, and (3) that racial bloc voting typically prevents the minority group from electing candidates of its choice. Gingles, 478 U.S. at 50-51.

This court, in its earlier opinion granting in part and denying in part the Redistricting Commission and Reed's motion to dismiss, allowed the Gardner parties to proceed on some Voting Rights Act counterclaims -- the "fracturing" or "influence district" claims -- for which they could not meet the first Gingles precondition. Illinois Legis. Redist. Comm'n, No. 91 C 6318, slip op. at 5-6 (N.D. Ill. Jan. 24, 1992). Finding that

applicability of the Gingles preconditions to single-member district cases was not fully settled, the court allowed these counterclaims to proceed past the dismissal stage. Id. Accordingly, the Gardner and Mendez parties were allowed to present evidence to support their claims that African-American and Hispanic voting strength was illegally diluted (or "fractured") in some areas where these minorities lacked populations large enough to constitute a majority in any one district. Nonetheless, the court finds that the Gingles preconditions provide a useful analytical framework for this case.

Additionally, the court notes that it must defer to a state-approved redistricting plan and the "policies and preferences" it comprises to the extent possible consistent with the requirements

of the Constitution and federal law. Upham v. Seamon, 456 U.S. 37, 40-43 (1982).

The Voting Rights Act counterclaims are essentially of two types: (1) the Gardner parties' claims that certain "super-majority" districts with 65% or greater African-American populations do not contain sufficient numbers of African-American voters, and (2) the Gardner and Mendez parties' claims that minority communities were "fractured" into several districts in areas where these communities are not large enough to constitute majorities in a single district.

1. Super-Majority Districts

The Gardner parties claim that African-Americans lack a "fair opportunity" to elect candidates of their choice in eight House of Representatives

districts and three Senate districts, all on the south side of Chicago, despite their super-majority status. The population statistics for these districts are as follows:

District		African-American population		
House	total	percent	voting age	percent
5	63,399	65.4	41,892	62.7
6	63,087	65.1	39,324	57.2
21	63,812	65.9	46,060	64.3
23	63,233	65.3	42,293	62.6
24	66,248	68.4	41,510	64.8
26	70,507	72.8	48,509	72.4
27	63,032	65.1	47,065	65.0
28	63,357	65.4	45,166	63.9
Senate				
3	126,486	65.3	81,216	59.9
12	129,481	66.8	83,813	63.7
14	126,389	65.2	92,231	64.4

A 65% population of a particular minority has generally been regarded by courts, the Department of Justice, and reapportionment experts as sufficient to provide that minority group with a meaningful opportunity to elect candidates of their choice. See, e.g., United Jewish Orgs., Inc. v. Carey, 430 U.S. 144, 164 (1977); Latino Political Action Comm., Inc. v. City of Boston, 784 F.2d 409, 414 (1st Cir. 1986); Ketchum v. Byrne, 740 F.2d 1398, 1413-16 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); Hastert, 777 F.Supp. at 647 and n.20; Rybicki v. State Bd. of Elections, 574 F.Supp. 1082, 1147 n.4 (N.D. Ill. 1983). The Gardner parties' expert witness, Kimball W. Brace, accepted the 65% guideline for this purpose in both Rybicki and, with

qualifications, at trial in this case.[7] Some cases also discuss a 60% minority voting age population threshold. See, e.g., Hastert, 777 F.Supp. at 647 n.20 (listing the 60% percent voting age figure in the conjunctive with the 65% overall

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[7]On cross-examination, when asked whether he agreed that 65% is the amount "generally presumed necessary," Brace said "[p]resumed without any analysis, yes; but one has to do the analysis" (Trial Transcript at 218). Later on cross, Brace described the 65% figure as a "rough rule of thumb" and said the percent actually needed varies between different areas (Tr. at 225-27). Brace also acknowledged stating, in his article Minority Voting Equality: The 65 Percent Rule in Theory and Practice, 10 Law and Policy 43 (January 1988), based on a review of 20 years of election returns in various parts of the country including Chicago, that a 62.1% minority population was sufficient to equalize minority and white voter turnout (Tr. at 223, 226-7). He additionally conceded that, in the article, he found that only a 1% upward adjustment was needed for minorities in Chicago to equalize their voter registration with that of whites, instead of the 5% figure for this purpose which is included in the 65% overall "rule of thumb" (Tr. at 226-28).

figure, suggesting that both must be met); State of Mississippi v. United States, 490 F.Supp. 569, 575 (D.D.C. 1979) (three-judges panel) (listing the voting age and overall figures in the disjunctive, suggesting that meeting either is sufficient) (cited in Ketchum, 740 F.2d at 1416), aff'd, 444 U.S. 1050 (1980). Each of the districts listed above meets the 65% overall threshold, and all but two (the House 6th and Senate 3d) meet the 60% voting age threshold, and those two narrowly miss that second guideline.

Nonetheless, the Gardner defendant\counter-plaintiffs and the Task Force defendants contend that African-American voters' opportunity to elect their chosen candidates is at risk in these districts. This claim is based on the splitting of African-American

"communities of interest," including city wards and their political organizations, community groups and church congregations into several districts in the state-approved redistricting plan. The new districts contain fragments of various groups, which will likely at times support different African-American legislative candidates, according to this argument. The multiple African-American candidacies in Democratic Party primary elections will in turn allegedly enable candidates supported by substantial white bloc voting to win primaries and be elected because winning the Democratic nomination in Chicago is tantamount to election. Another aspect of the alleged violation, asserted by tne Task Force, is the pairing of African-American and white incumbent legislators in the same districts, which

makes the African-Americans' reelection more difficult. These problems are allegedly exacerbated by declining African-American voter turnout in the affected districts while white voter turnout has remained stable.

In support of these arguments, the Gardner Task Force parties submitted election results from various elections, the expert testimony of Brace, and the affidavit of a second expert, Roger K. Oden.[8]

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[8]The Gardner parties also introduced without objection the affidavits of 14 incumbent African-American members of the Illinois General Assembly and of James W. Compton, president of the Chicago Urban League. These affidavits, which were initially filed with the Redistricting Commission, detail the splitting of wards and community groups in the state-approved plan. Both of the principal expert witnesses who testified at trial, Brace for the Gardner parties and Richard Engstrom for the Commission and Reed, said they considered the affidavits in reaching their conclusions.

According to the Gardner parties, the 1991 Chicago mayoral primary and general elections are particularly significant. Attached to the Oden affidavit were charts showing the results from the areas included in seven of the eight super-majority House districts being challenged (all but district 26) and the three super-majority Senate districts. In the primary, a white candidate, incumbent Richard M. Daley, outpolled African-American candidate Danny Davis in six of the seven listed House districts and in all three of the Senate districts, with Davis carrying only the area included in the new House District 28. A second white candidate, Jane Byrne, finished a distant third in all seven of the listed House districts and in the three Senate Districts. In the general election, Daley

beat an African-American challenger, R. Eugene Pincham, by substantial margins in all seven listed House districts and all three Senate districts. The Gardner parties cite other elections as well, including the 1987 and 1989 Chicago mayoral elections, to show waning African-American turnout and the alleged vulnerability of African-American voting rights in the challenged districts. Brace, the Gardner parties' expert, based his opinion that the challenged districts violated the Voting Rights Act on these elections and some findings in Oden's affidavit, among other factors.

In response, the Redistricting Commission and Reed cite the testimony of their expert witness, Richard Engstrom, who found the challenged districts complied with the Voting Rights Act.

Engstrom based on his conclusion on results in the eleven most-recent elections in which voters in the areas at issue had a choice between an African-American or non-African-American candidate for a city, county or state office. In House District 26, the African-American candidates were the leading vote-getters in each of the eleven elections. In the other seven challenged House districts and each of the three challenged Senate districts, the African-American candidate led the vote in all but two of the elections. The two exceptions were the 1991 Chicago mayoral primary and general elections.

The court finds Engstrom's opinion to be better reasoned and better supported by the record than Brace's opinion to the extent there are conflicts between the two

experts' testimony. Moreover, the Gardner parties bore the burden of showing that the challenged districts did not comply with the Voting Rights Act. That burden was particularly heavy in view of the 65% or greater African-American majorities in each of the eight House and three Senate districts at issue. Increasing the African-American majorities in those districts further would run the risk of diluting African-American voting strength through "packing," and thereby constitute a § 2 Voting Rights violation. See Gingles, 478 U.S. at 46 n. 11 (dilution may be caused by dispersal or by excessive concentration of minority voters); Ketchum, 740 F.2d at 1408 n.7 ("packing" -- wasting of voting strength -- may be evidenced by majorities greater than 65-70%); Hastert, 777 F.Supp at 646 (packing

wastes monitory voting power and reduces minority influence in other districts). Based on the "totality of the circumstances", the Gardner parties have failed to show that the super-majority districts violate the Voting Rights Act in any respect. The super-majority districts provide African-Americans with a meaningful opportunity to elect candidates of their choice.

2. Fracturing

Two types of "fracturing" claims under § 2 of the Voting Rights Act have been raised in this case: (1) that a 50% Hispanic district, which would allow Hispanic voters to elect candidates of their choice, should have been created in Chicago, and (2) that smaller African-American and Hispanic communities around the state should have been kept together

rather than split among several districts, reducing the minority "influence' or "swing" potential.

Regarding the first type of claim, the Gardner and Mendez parties contend that Hispanic voting strength was diluted or "fractured" on the northwest side of Chicago by the lines of House District 33, which has a 39.4% Hispanic population and 33.9% Hispanic voting age population, when a 50% Hispanic district (44.3% Hispanic voting age) could have been created by reducing the Hispanic populations in two super-majority House districts: the 3d District (71.3% Hispanic, 67.3% Hispanic voting age) and the 4th District (70.%% Hispanic, 64.9% Hispanic voting age). The Gardner and Mendez parties assert that such a 50% Hispanic district would allow Hispanics to elect candidates of their

choice, but that even if they could not, the larger Hispanic population would be able to "swing" elections between competing non-Hispanic groups.

The three experts who testified at trial -- Gordon G. Henderson for the Mendez parties, Brace for the Gardner parties, and Engstrom for the Redistricting Commission and Reed -- agreed that the 33d District could have been drawn to contain an Hispanic majority, but disagreed on the validity of such a district.

Both Brace and Henderson testified that Hispanic voters could elect candidates of their choice in the 50% district, in part because the roughly 44% Hispanic voting age population would equal the white voting age population, with African-Americans, Asians and Pacific

Islanders constituting the remainder of the district. Additionally, Brace and Henderson felt that the Hispanic super-majorities in the 3d and 4th Districts were excessive. They testified that shifting enough Hispanics from those districts to push the 33d District Hispanic population up to 50% would not harm Hispanic voting strength in the 3d and 4th Districts, where the Hispanics would retain 68% majorities.

Engstrom considered 65% the appropriate opportunity-to-elect figure for all three of the districts, without closely evaluating the demographics of each district. Raising the 33d District to 50% Hispanic would therefore not be sufficient, he reasoned. Moreover, Engstrom felt the extra Hispanics in the 3d and 4th Districts, made those districts

more secure and did not constitute "packing."

Initially, the court finds that the voting age population is a more significant factor than the overall population. McNeil v. Springfield Park Dist., 851 F.2d 937, 945 (7th Cir. 1988) (those ineligible to vote are not parties to a § 2 vote dilution claim; citing with approval cases holding that voting age population is the relevant factor in applying the Gingles single-district majority precondition), cert. denied, 490 U.S. 1031 (1989). There is no evidence that the 33d House District could be given an Hispanic voting age majority while retaining the Hispanic super-majority status in the 3d and 4th Districts. More importantly, the Gardner and Mendez parties have not shown that the 44.3%

Hispanic voting age population they seek in the 33d District would be sufficient to give Hispanic voters an opportunity to elect candidates of their choice. The record, as well as the general 65% guideline, suggest that the Hispanic voting age population must be substantially higher than 44.3% to provide such an opportunity.

A second type of "fracturing" claim -- that minority "influence" or "swing" voting potential was reduced by splitting up minority communities -- was raised by the Gardner and Mendez parties with regard to Hispanics on the northwest side of Chicago, and by the Gardner parties with regard to several smaller minority communities around the state. These other communities are as follows, showing the largest minority population both among the

encompassing state-approved districts and in one of those districts under a map suggested by the Gardner parties:

Area[9]	House Dists.
Waukegan	59, 61 and 62
Leyden Township*	77 and 78
Aurora	42 and 84
Rock Island	71 and 72
Springfield**	99 and 100

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[9]The Gardner parties' amended counterclaim lists additional areas -- Joliet, Elgin, Decatur, Bloomington-Normal, and East St. Louis ("Metro East") -- that were allegedly "fractured." These areas, however, were not discussed in the Gardner parties' post-trial brief and proposed findings of fact and conclusions of law. Any claims regarding these areas are therefore waived. See United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."); United States v. Giovannetti, 919 F.2d 1223, 1230 (7th Cir. 1990) ("A litigant who fails to press a point by supporting it with pertinent authority or by showing why it is a good point despite a lack of authority ... forfeits the point. We will not do his research for him") (emphasis in original; citations omitted).

Champaign-Urbana**	103 and 104
Top Min.Dist.	Suggested
36.5% (#59)	44.2%
12.9% (#77)	16.4%
26.9 (#84)	36.7%
15.0% (#71)	16.0%
12.7% (#100)	13.0%
11.9% (#104)	12.8%

*Hispanic only. **African-American only.

An "influence" district claim under the Voting Rights Act -- alleging that the voting strength of minority communities was illegally reduced even though those communities were not sufficiently large and compact to constitute a majority in a single district -- has been recognized by very few courts. See, e.g., Armour v. State of Ohio, 775 F.Supp. 1044, 1052 (N.D. Ohio 1991) (three-judge panel) (did not fully decide "influence" issue because

found that African-American community constituting one-third of the voting age population could elect candidates of its choice); Leblance-Sternberg v. Fletcher, No. 91 Civ. 2550, 1991 U.S. Dist. LEXIS 18835, at *30-*32 (S.D.N.Y. Dec. 24, 1991) (denying motion to dismiss where racial motivation, not just effect, alleged).

A major problem with such "influence" claims is the lack of an objective limit to such claims. See McNeil, 851 F.2d at 947 ("Courts might be flooded by the most marginal section 2 claims if plaintiffs had only to show only that an electoral practice or procedure weakened their ability to influence elections."); Hastert, 777 F.Supp. at 653-55 (discussing potential problems of measuring injury, and finding that Gingles potential single-district majority precondition "cannot

logically be limited" to challenges to at-large elections). The requirement that a minority group be large enough to control a district, not just "influence" it, enables the courts to adjudicate Voting Rights claims with a reasonable amount of efficiency and consistency. See Hastert, 777 F.Supp. at 654 (discussing court administration concerns).

The "swing" argument is based on the division between relatively large, stable voting blocs, such as the regular Democratic and Republican voters. If a minority bloc is independent, and is larger than the difference between the two major voting blocs, then the minority bloc can "swing" elections between the candidates favored by the two major blocs. Where such a pattern is established, candidates may be very responsive to the

minority bloc's concerns in an effort to win their votes. See, e.g., Solomon v. Liberty County, Fla., 865 F.2d 1566, 1583 (11th Cir. 1988) (noting lower court's finding that black voters would have more influence as county-wide "swing" voters in at-large elections than as majority in a single-member district, but rejecting that as a proper basis for relief under § 2 of the Voting Rights Act), vacated, 899 F.2d 1012 (11th Cir. 1990) (en banc).

The Gardner parties' arguments regarding "influence" districts outside of Chicago are based primarily on overall population figures, not voting age population. Brace testified about the breakdown of major voting blocs, and the ability of minority voters to play a "swing" role, in various elections in the challenged districts. This analysis is

difficult to evaluate without looking at the voting age populations in the state-approved districts. Generally, minority voting age population is presumed to be lower than the overall minority population. See e.g., Ketchum, 740 F.2d at 1415 (explaining 65% minority population guideline for opportunity to elect candidates as including 5% adjustment for "young population"). The voting strength of the minority populations is therefore presumably weaker than their overall population members would suggest.

The largest minority population increases sought in this case are 11% in District 33 on the southwest side of Chicago, which would raise the Hispanic population to 50%, and almost 10% in Waukegan, which would raise the total

minority population to 44.2% in one district. Increases of this size would likely increase the political strength of minority voters, assuming they would vote as a reasonably unified bloc. It would be difficult, however, to quantify the increased strength; any analysis would require a substantial amount of speculation regarding the minority groups' cohesiveness and ability to form alliances with other groups in order to exercise some measure of voting control. Moreover, minority voting strength would decline in adjoining districts that would lose minority voters. The net effects are uncertain.

At the other end of the scale, minority population increases of only 1% or less are sought in districts around Rock Island, Springfield and Champaign-

Urbana, and even with such increases, none of the districts would have a minority population above 16%. The "fracturing" in these areas appears insignificant. Although it is theoretically possible for a 1% increase in such relatively small voting groups to provide the decisive margin in an election, the Gardner parties have failed to show that this possibility has legal significance. Rather, these claims illustrate what Justice Cardozo called the "tendency of a principle to expand itself to the limit of its logic." Krulewitch v. United States, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) (quoting Benjamin Cardozo, The Nature of the Judicial Process, 51). If 10% of the voters can "swing" an election, perhaps so can 1% or 0.1%. A single voter is the logical limit. The Gardner parties need

more than logic; they need proof. The evidence, however, does not clearly show that a 13.0% minority population in a Springfield district would be significantly more influential than the 12.7% provided for, or that a 12.8% minority would be significantly more powerful than 11.9% in a Champaign-Urbana district.

The Gardner and Mendez parties have failed to show that the state-approved map violates their rights under § 2 of the Voting Rights Act with regard to their "influence" or "swing" potential in any of the challenged districts. Their arguments in this regard are speculative and unpersuasive. Moreover, there are serious questions as to whether "swing" claims are legally cognizable under the Voting Rights Act, see Hastert, 777 F.Supp. at 651-55,

and whether they are legally manageable. See Note, Compensatory Racial Reapportionment, 25 Stan. L. Rev. 84, 99-100 (1972) (discussing possible "vote maximization test" with a minority group set up as the "swing vote" in several districts rather than as the majority in a single district; despite theoretical merit, "the courts have been both unable and unwilling to make such speculative assessments on the outcome of political events. Realistically, such a test would be judicially unworkable.") (emphasis added).

Moreover, an inability to elect a group's chosen candidates or to "swing" elections does not necessarily mean a lack of influence. Voters for losing candidates are "usually deemed to be adequately represented by the winning

candidate and to have as much opportunity to influence that candidate as other voters in the district." Davis v. Bandemer, 478 U.S. 109, 132 (1986) (plurality opinion).

Accordingly, the court finds for the Redistricting Commission and Reed on the "fracturing" counterclaims of the Gardner and Mendez parties regarding the Hispanic community of the northwest side of Chicago and of the GArdner parties regarding African-American and Hispanic communities elsewhere around the state.

III. 14th and 15th Amendments

The Gardner parties, in Count IV of their amended counterclaim, allege that the state-approved redistricting plan violates their equal protection rights under the 14th Amendment and their voting rights under the 15th Amendment. In

support of these claims, they relied upon the same evidence that was introduced regarding their Voting Rights Act claims.

Racially motivated drawing of redistricting lines, if intended to minimize or cancel the voting strength of a racial minority, violates both the 14th Amendment equal protection clause and the 15th Amendment. City of Mobile v. Bolden, 446 U.S. 55, 62-66 (1980); Hastert, 777 F.Supp. at 645; see also Beer v. United States, 425 U.S. 130, 142 n.14 (1976) (noting that the Supreme Court has never found a reapportionment plan in violation of the 15th Amendment). The court, however, as discussed previously finds that the state-approved map doe snot illegally cancel or weaken the voting strength of African-American or Hispanic voters. Additionally, we find a lack of

evidence that the Redistricting Commission was motivated by racial concerns or that the map which the Illinois Supreme Court approved was drawn along racial lines. See Wright v. Rockefeller, 376 U.S. 52, 56-57 (1964). Therefore, in addition to failing to prove a discriminatory effect for 14th and 15th Amendment purposes, the Gardner parties have also failed to prove a discriminatory motive as required under those amendments. The court accordingly finds for the Redistricting Commission and Reed on Count IV of the Gardner parties' counterclaim.

IV. Declaratory Judgment

The Redistricting Commission and Reed have pursued their complaint for a declaratory judgment under 28 U.S.C. §§2201, 2202 finding that the redistricting plan approved by the

Illinois Supreme Court is valid under the Voting Rights Act and the Constitution. In light of the evidence in this case, and as discussed above, the court finds that the state-approved plan does not violate the rights of minority voters under the § 2 of the Voting Rights Act, or the 14th or 15th Amendments. Additionally, there is an actual case or controversy regarding the validity of the state-approved plan in view of the opposition to that plan at trial by the Gardner and Mendez parties, as well as the Task Force defendants. See Atlanta Int'l Ins. Co. v. Atchison, T. and S.F. R. Co., 938 F.2d 81, 83 (7th Cir. 1991) (actual controversy required before federal court can exercise its discretionary power to issue declaratory judgments). The court deems it appropriate to issue the declaratory

relief requested by the Redistricting Commission and Reed, and the state-approved redistricting plan is therefore declared to be in compliance with the applicable federal law and constitutional provisions.

CONCLUSION

The court finds, based on the record as a whole, that the redistricting plan for the Illinois General Assembly approved by the Illinois Legislative Redistricting Committee and the Illinois Supreme Court complies with the Voting Rights Act, the 14th Amendment and the 15th Amendment. The plan provides a meaningful opportunity for minority voters to elect candidates of their choice in areas where this opportunity is warranted by their population numbers, and does not

intentionally discriminate along racial lines.

Consequently, the court finds for plaintiff\counter-defendants Redistricting Commission and Reed on Counts I and IV of the Gardner defendant\counter-plaintiffs' counterclaim, and on the Mendez defendant\counter-plaintiffs' counterclaim; Counts II and III of the Gardner defendants' counterclaim are dismissed; and the state-approved redistricting plan is declared valid under the applicable federal law and constitutional provisions. The Redistricting Commission and Reed's motion for summary judgment is denied to the extent it seeks to bar the Gardner and Mendez counterclaims on grounds of res judicata and the Rooker-Feldman doctrine,

and is otherwise rendered moot by the court's judgment.

IT IS SO ORDERED.

ENTER:

CHARLES RONALD NORGLE, SR.,
Judge United States
District Court

Dated: 3-11-92

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, ET AL., Plaintiffs, v. GARY J. LaPAILLE, ET AL., Defendants.	
JOSEPH GARDNER, LOVANA JONES, DAN BARRIERO, WILLIAM SHEPHARD, JR., JOHN LEE JOHNSON, GWENDOLYN SCOTT, LAURA BARTH, WARREN DORRIS, MARVIN FRENCH, JAYME CAIN, PERCY CONWAY, JOSEPH BELMAN, LUIS ALBARASIN, CROTIS TEAGUE, JR., HENRY LANDRAU, CAROLYN TONEY, FRED SMITH, CHARLIE WILSON, JR., and BOBBY E. THOMPSON, on their own behalf and on behalf of all others similarly situated, Counter-Plaintiffs, v. ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, AL JOURDAN, FRANK WATSON, ROBERT CHURCHILL, GENE	No. 91 C 6318

HOFFMAN, DALLAS)
INGEMUNSON, GEORGE H.)
RYAN, sued in his)
official capacity as)
ILLINOIS SECRETARY OF)
STATE, and ILLINOIS BOARD)
OF ELECTIONS,)
)
Counter-Defendants.)

O R D E R

Before KANNE, Circuit Judge, NORGLE, District Judge, and ZAGEL, District Judge

NORGLE, District Judge.

Before the court are post-trial motions by two groups: a motion for a new trial by a group of defendant/counter-plaintiffs known as the Gardner parties, and a motion to alter or amend the judgment, or alternatively for a new trial, by a group of defendants who have joined together as the Task Force for Black political Empowerment ("Task Force"). For reasons that follow, the motions are denied.

This litigation involves challenges to a decennial redistricting plan for the Illinois General Assembly approved by the Illinois Legislative Redistricting Commission on January 6, 1992 and upheld by the Illinois Supreme Court on January 10, 1992. People ex rel. Burris v. Ryan, 147 Ill.2d 270, 588 N.E.2d 1033 (1992) (January 14 opinion explaining January 10 ruling). This court conducted a trial on February 4 through 7, and 11, 1992 and subsequently issued an opinion declaring the redistricting plan valid and rejecting various defendant/counter-plaintiffs' challenges to that plan. Illinois Legis. Redist. Com'n v. LaPaille, No. 91 C 6318, 1992 U.S. Dist. LEXIS 2930 (N.D. Ill March 11, 1992).[1]

---

[1] For additional background information, see this court's other prior rulings allowing plaintiffs to file a

The Illinois primary election was held on March 17, 1992, six days after this court declared the redistricting plan valid. The instant motions by the Gardner parties and the Task Force, both filed on April 3, 1992, seek a new trial at which the results of the March 17 primary election could be considered by the court. The Gardner motion was brought under Federal Rule of Civil Procedure 59. The Task Force motion, however, does not mention Rule 59 or any other rule. Nonetheless, the court will construe the Task Force motion under Rule 59.

"Motions for a new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or

---

third amended complaint, 782 F.Supp. 1267 (1991), and dismissing Count II and III of the Gardner parties' counter-complaint. 782 F.Supp. 1272 (1992).

must present newly discovered evidence." Federal Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986). To qualify as "newly discovered evidence" under Rule 59, the evidence "must have been in existence at the time of trial . . . ." Peacock v. Board of Sch. Comm'rs, 721 F.2d 210, 214 (7th Cir. 1983). Moreover, "[t]he evidence must be material, admissible, credible, not merely cumulative or impeaching, and likely to change the outcome upon retrial." Id. at 213-14. Finally, whether to grant or deny a motion for a new trial is discretionary. EEOC v. Century Broadcasting Corp., 957 F.2d 1446, 1460 (7th Cir. 1992).

The election results which form the basis for the Gardner parties' and the Task Force's motions were not in existence at the time of trial. The Gardner parties

argue, however, that such evidence may warrant a new trial motion if the new evidence makes a "prima facie showing that a different result should have been reached initially . . . ." Unarco Indus., Inc. v. Evans Prods. Co., 403 F.2d 638, 639 (7th Cir. 1968); see also Peacock, 721 F.2d at 214 ("[m]aterial not in existence until after trial falls within 60(b)(2) only if it pertains to facts in existence at time of trial"; same requirements under Rules 59 and 60(b)(2)).

The new evidence proffered by the Gardner parties and the Task Force, however, does not sufficiently cast doubt upon the trial result so as to warrant a new trial. The Gardner parties and the Task Force argue that the primary elections results prove their arguments at trial that several Illinois Senate and

House districts on the South Side of Chicago with African-American super-majorities of 65% or more were inadequate to provide a meaningful opportunity for African-American voters to elect candidates of their choice. The Gardner parties specifically cite three House districts (Nos. 23, 24 and 28) and one Senate district (No. 12) in which white candidates prevailed over African-American candidates in the Democratic primary. The Task Force similarly cites those districts as well as House district 29 and 32. Each district which the Gardner parties and the Task Force cites featured a single white candidate running against multiple African-American candidates.

The cited primary results establish, at most, that African-Americans' chosen candidates were not guaranteed election.

That is clearly insufficient under both the Voting Rights Act, 42 U.S.C § 1973(b) -- "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population" -- and the 14th Amendment equal protection clause. City of Mobile v. Bolden, 446 U.S. 55, 75-77 (1980) (right to equal participation does not protect any particular group from electoral defeat). The primary results do not show that African-Americans in the cited districts were denied a meaningful opportunity to elect their chosen candidates.[2]

---

[2] The Gardner parties' and Task Force's reliance on results from districts with multiple African-American candidacies arguably undermines their arguments in view of the three Gingles preconditions for a Voting Right Act claim, the second of which requires that the minority group at issue be politically cohesive. Thornburg v. Gingles, 478 U.S. 30, 50-51

Accordingly, the Gardner parties and the Task Force have failed to show that a new trial, or any alteration of the judgment previously entered, is warranted.

CONCLUSION

The Gardner parties' motion for a new trial and the Task Force's motion to alter or amend the judgement or alternatively for a new trial are denied.

IT IS SO ORDERED.

ENTER:

_____

CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: _____

(1986).

APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, AL JOURDAN, FRANK WATSON, ROBERT CHURCHILL, GENE HOFFMAN, and DALLAS INGEMUNSON,	)	
Plaintiffs,	)	
vs.	)	No. 91 C 6318
	)	JUDGE NORGLE
GARY J. LaPAILLE, etc., et al.,	)	JUDGE KANNE
	)	JUDGE ZAGEL
Defendants.	)	MAGISTRATE WEISBERG
	)	
JOSEPH GARDNER, LOVANA JONES, DAN BARRIERO, WILLIAM SHEPHARD, JR., JOHN LEE JOHNSON, GWENDOLYN SCOTT, LAURA BARTH, WARREN DORRIS, MARVIN FRENCH, JAYME CAIN, PERCY CONWAY, JOSEPH BELMAN, LUIS ALBARASIN, CROTIS TEAGUE, JR., HENRY LANDRAU, CAROLYN TONEY, FRED SMITH, CHARLIE WILSON, JR., and BOBBY E. THOMPSON, on their own	)	

behalf and on behalf of all others similarly situated,	)	
Counter-Plaintiffs-Appellants,	)	
v.	)	RECEIVED JUL 10 1992
ILLINOIS LEGISLATIVE REDISTRICTING COMMISSION, AL JOURDAN, FRANK WATSON, ROBERT CHURCHILL, GENE HOFFMAN, DALLAS INGEMUNSON, GEORGE H. RYAN, sued in his official capacity as ILLINOIS SECRETARY OF STATE, and ILLINOIS BOARD OF ELECTIONS,	)	H. STUART CUNNINGHAM UNITED STATES DISTRICT COURT
Counter-Defendants-Appellees.	)	

NOTICE OF APPEAL

Now comes counter-plaintiffs-appellants, Joseph Gardner, Lovana Jones, Dan Barreiro, William Shephard, Jr., John Lee Johnson, Gwendolyn Scott, Laura Barth, Warren Dorris, Marvin French, Jayme Cain, Percy Conway, Joseph Belman, Luis Albarasin, Crotis Teague, Jr., Henry

Landrau, Carolyn Toney, Fred Smith, Charlie Wilson, Jr., and Bobby E. Thompson, on their own behalf and on behalf of all others similarly situated, by their attorneys, and pursuant to federal Rule of Appellate Procedure 4(a)(4), United States Supreme Court Rule 18, and 28 U.S.c. §§1253, 2101 hereby appeals to the Supreme Court of the United States, from the Order entered on March 11, 1992 (a copy of which is attached hereto as Exhibit 1) [App. 1-58] finding that the redistricting plan for the Illinois General Assembly approved by the Illinois Legislative Redistricting Committee and the Illinois Supreme Court complies with the Voting Rights Act, the 14th Amendment and the 15th Amendment, and the Order entered on June 11, 1992 which was docketed on June 15, 1992 (a copy of

which is attached hereto as Exhibit 2) [App. 59-67] denying counter-plaintiffs-appellant's motion for a new trial and the Task Force's motion to alter or amend the judgment or alternatively for a new trial.

By this appeal, counter-plaintiffs-appellants will ask the Supreme Court to issue an order scheduling briefing and oral argument on the merits in order to review both Orders of the three-judge district court, reverse both Orders and enter judgment in favor of counter-plaintiffs-appellants, or in the alternative, to reverse both Orders, and remand this cause for further proceedings as determined by the Supreme Court and to grant such other and further relief as to which counter-plaintiffs-appellants may be entitled to on appeal.

JURISDICTIONAL STATEMENT

The Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. §1253. The three-judge United States District Court for the Northern District of Illinois entered an Order on March 11, 1992 and an Order on June 11, 1992 which was docketed on June 15, 1992, and pursuant to United States Supreme Court Rule 18 and 28 U.S.C. §2101, the present notice of appeal is timely and appropriate for consideration by this Court. In compliance with United States Supreme Court Rule 18, a jurisdictional statement shall be filed by the counter-plaintiff-appellants with the clerk of the Supreme Court as prescribed.

Respectfully submitted,

_____

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Supreme Court, U.S.
FILED
OCT 9 1992
OFFICE OF THE CLERK

(2)

NO. 92-522

In the

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH GARDNER, LOVANA JONES, DAN BARREIRO, WILLIAM SHEPARD, JR., JOHN LEE JOHNSON, GWENDOLYN SCOTT, LAURA BARTH, WARREN DORRIS, MARVIN FRENCH, JAYME CAIN, PERCY CONWAY, JOSEPH BELMAN, LUIS ALBARASIN, CROTIS TEAGUE, JR., HENRY LANDRAU, CAROLYN TONEY, FRED SMITH, CHARLIE WILSON, JR., AND BOBBY E. THOMPSON,

Appellants,

v.

GEORGE H. RYAN sued in his official capacity as ILLINOIS SECRETARY OF STATE, ILLINOIS STATE BOARD OF ELECTIONS, ALBERT JOURDAN, FRANK WATSON, ROBERT CHURCHILL, DALLAS INGEMUNSON, and GENE HOFFMAN,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED FOR REVIEW

Whether the United States District Court for the Northern District of Illinois properly approved the Illinois state legislative redistricting plan over challenges to the plan based on federal law.

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NO. 92-522

In the
Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH GARDNER, et al.,

Appellants,

v.

ILLINOIS LEGISLATIVE
REDISTRICTING COMMISSION, et al.,

Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO DISMISS OR AFFIRM

Appellees Illinois Legislative Redistricting Commission ("Commission"), Illinois State Board of Elections, Al Jourdan, Frank Watson, Robert Churchill, Gene Hoffman, Dallas Ingemunson, and George Ryan in his official capacity as Illinois Secretary of State, (collectively, "Appellees"),[1] hereby move this Court, pursuant to Supreme Court Rule 18.6, to dismiss this appeal or to affirm the decision of the three-judge panel of the United States District Court for the Northern District of Illinois.

---

1 The Illinois State Board of Elections, listed as one of the Appellees of this proceeding, is not a party to this brief. However, the Board of Elections has acted as a nominal party, and did not engage in any substantive argument at any time, during the proceedings below.

OVERVIEW OF THE MOTION

Appellants seek to have this Court review two decisions of the three-judge panel in the district court rejecting Appellants' federal law challenges to a plan of redistricting for the Illinois General Assembly: a March 11, 1992 opinion issued after a five-day trial of this case, Illinois Legislative Redistricting Commission v. LaPaille, 786 F. Supp. 704 (N.D. Ill. 1992) ("*March 11 Opinion*"); and a June 11, 1992 order denying Appellants' motion for a new trial, *Illinois Legislative Redistricting Commission v. LaPaille*, 792 F. Supp. 1110 (N.D. Ill. 1992) ("*June 11 Opinion*"). The *March 11 Opinion* and *June 11 Opinion* upheld the final reapportionment plan approved by the Commission ("Jourdan III-A") against Appellants' challenges under the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the United States Constitution.

The Jourdan III-A plan of redistricting was the result of numerous hearings and debates in the Illinois General Assembly, additional hearings, debates, and public comment before the Commission (a special bipartisan redistricting body convened pursuant to the Illinois Constitution), and extensive briefing and argument before the Illinois Supreme Court. The Illinois Supreme Court rejected Appellants' challenges to the Jourdan III-A plan, ultimately finding that the plan complied with the state constitutional requirements for compactness, contiguity, and equality of population. The Illinois Supreme Court found specifically that the plan did not dilute the votes of minorities in violation of the free and equal elections clause of the Illinois Constitution. This Court denied Appellants' Petition for Writ of Certiorari to the Illinois Supreme Court. *Gardner, et al. v. Ryan*, No. 91-1655 (August 18, 1992).

Appellants' federal law challenges to Jourdan III-A were tried before a three-judge panel during February 1992. Initially, the Commission moved to dismiss the Appellants' claims but the court denied the motion in part and ordered a trial. The panel heard expert testimony and examined voluminous documentary evidence submitted by various parties (including Appellants) challenging Jourdan III-A, as well as Appellees' evidence. Also before the trial court was Appellants' own proposed plan of reapportionment (the "Gardner Plan"). In addition, the panel had before it the entire record of the

proceedings before the Commission and in the Illinois Supreme Court. The three-judge panel carefully considered this voluminous evidence and, in the *March 11 Opinion*, correctly determined that Jourdan III-A satisfied the Voting Rights Act and the United States Constitution. *See March 11 Opinion*, 786 F. Supp. at 717-18. The panel also correctly determined, in the *June 11 Opinion*, that a new trial was not necessary in light of Appellants' claims about the results of primary elections held after the three-judge panel's *March 11 Opinion* approving Jourdan III-A. *See June 11 Opinion*, 792 F. Supp. at 1113.

In this Court, Appellants seek review of the three-judge panel's March 11 and June 11 Opinions. In their Jurisdictional Statement filed September 9, 1992, Appellants claim four alleged infirmities in the two opinions:

(1) They contend the three-judge panel failed to consider the "totality of the circumstances" in rejecting Appellants' challenges to certain super-majority and "influence" districts in Jourdan III-A (Juris. Stmt. at 27-33);

(2) They contend the three-judge panel failed to recognize and apply the concept of "influence" districts to certain "downstate" areas (Juris. Stmt. at 35-37);

(3) They contend the three-judge panel failed to recognize and apply the concept of "influence" districts to a so-called Hispanic "influence" district on the northwest side of Chicago (Juris. Stmt. at 27, 33-35); and

(4) They contend the three-judge panel failed to explain how Appellants did not satisfy their burden of proof for the constitutional challenge to Jourdan III-A (Juris. Stmt. at 37-38).

None of these arguments justify this Court's review of the three-judge panel's March 11 and June 11 Opinions. Appellees therefore move to dismiss this appeal or in the alternative to affirm the rulings of the panel below.

ARGUMENT

I. THE THREE-JUDGE PANEL PROPERLY DENIED THE APPELLANTS' CHALLENGES UNDER THE VOTING RIGHTS ACT IN UPHOLDING THE JOURDAN III-A PLAN

The Jourdan III-A plan was designed to maximize the voting influence of minority groups throughout the State of Illinois. It created eighteen House and eight Senate African-American super-majority districts (with total African-American population over 65% and voting age population near or above 60%) and four House and two Senate Hispanic super-majority districts. By contrast, the Appellants' plan, developed and advocated by interests of the Democratic Party, contained only seventeen House and eight Senate African-American super-majority districts and four House and two Senate Hispanic super-majority districts.

Despite Jourdan III-A's clear superiority in its responsiveness to minority voting interests, Appellants challenged Jourdan III-A under the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, and the Fourteenth and Fifteenth Amendments as follows: (i) that Jourdan III-A created certain African-American super-majority districts in and around Chicago which denied African-Americans the opportunity to elect candidates of their choice; (ii) that Jourdan III-A "fractured" minority voting strength in certain downstate areas; and (iii) that Jourdan III-A "fractured" Hispanic voting strength by failing to create an Hispanic "influence" district on the northwest side of Chicago. The fracturing claims, in essence, alleged that districts were constitutionally infirm because they failed to group together all of the minorities in a two- or three-district area even though the minority population in the district into which they would be consolidated still fell far short of a majority — in some instances, the consolidated minority population was as low as 5.0%. The "influence" district claim, in essence, alleged that the Jourdan III-A districts were illegal because they did not group minorities in a manner which maximized the ability of the minority group to "influence" or "swing" an election. In all three arguments, Appellants contended that Jourdan III-A diluted minority voting strength.

After a five-day trial, the three-judge panel took the matter under advisement for 31 days and then issued an order rejecting Appellants' claims. *March 11 Opinion*, 786 F. Supp. at 717. Despite Appellants' generalizations, both the *March 11* and *June 11 Opinions* reflect a careful consideration of the facts and law.

To establish a vote dilution claim under section 2 of the Voting Rights Act, a plaintiff must show three threshold elements: (1) the minority group is sufficiently large and compact to constitute a majority of the population in the district; (2) the minority group is politically cohesive; and (3) the non-minority group usually votes sufficiently as a block to defeat the minority group's preferred candidates. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 649 (N.D. Ill. 1991). Appellants failed to establish these factors at trial.

Lower courts applying *Gingles* have consistently held that these threshold elements must be satisfied *before* a court looks at the "totality of the circumstances," or the so-called *Zimmer* factors.[2] *See McNeil v. Springfield Park Dist.*, 851 F.2d 937, 943 (7th Cir. 1988) ("We therefore must reject appellants' contention that a court, in considering section 2 claims, must explore the totality of the circumstances without first determining whether the *Gingles* threshold criteria are met."), *cert. denied*, 490 U.S. 1031 (1989); *see also Westwego Citizens for Better Gov't v. City of Westwego (Westwego III)*, 946 F.2d 1109, 1116 (5th Cir. 1991); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906 F.2d 524, 527 (11th Cir. 1990); *Hastert*, 777 F. Supp. at 648; *Williams v. City of Dallas*, 734 F. Supp 1317, 1319, 1401 (N.D. Tex. 1990). The three-judge panel reached this same conclusion. *See March 11 Opinion*, 786 F. Supp. at 711.

Appellants claim that *Gingles* required the three-judge panel to undertake a detailed "totality of the circumstances" analysis in its opinion even though they failed to establish the first three factors

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2 *Zimmer v. McKeithen*, 485 F.2d 1297, 1305-07 (5th Cir. 1973) (en banc), *aff'd sub nom, East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam).

under *Gingles* Juris. Stmt. at 28-29.[3] Appellants' claim that the three-judge panel did not consider the proffered "totality of the circumstances" evidence, Juris. Stmt. at 28-29, is belied by the record. The three-judge panel noted the affidavits of community leaders which were introduced into evidence by Appellants, *March 11 Opinion*, 786 F. Supp. at 713 n.8, and the three-judge panel specifically found no Voting Rights Act violations in the African-American super-majority districts "based on the 'totality of the circumstances.'" *Id.* at 713.[4] Second, Appellants have completely misread this Court's discussion of "totality of the circumstances" in *Gingles*. The citation to *Gingles* proffered by Appellants, 478 U.S. at 43, *see* Juris. Stmt. at 26, is to the *Gingles* Court's discussion of language of the Voting Rights Act and its legislative history. The *Gingles* court went on to set out the three threshold elements and to clearly place the "totality of the circumstances" factors in a *subordinate role* to showing that

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3 Appellants offered "totality of the circumstances" evidence in the form of affidavits from various individuals in certain communities.

4 As with the "totality of the circumstances" analysis, assertions that "the extent of the District Court's analysis of the evidence proffered regarding super-majority districts" was the court's conclusion that Appellees experts' opinion "was better reasoned and better supported by the record," Juris. Stmt. at 29, is also a gross mischaracterization of the record. The *March 11 Opinion* makes clear that the three-judge panel took into consideration population information, *see March 11 Opinion*, 786 F. Supp. at 711-12, 715, results from previous elections, *id.* at 713, prior use of the 65% population standard, *id.* at 712-14, and even the affidavits of community leaders which the Appellants introduced into evidence, *id.* at 713 n.8. Indeed, after considering this evidence, the three-judge panel concluded: "Based on the 'totality of the circumstances,' the Gardner parties [*i.e.*, Appellants] have failed to show that the super-majority districts violate the Voting Rights Act in any respect. The super-majority districts provide African-Americans with a meaningful opportunity to elect candidates of their choice." *March 11 Opinion*, 786 F. Supp. at 713. Precisely because the Appellants failed at trial to establish the *Gingles* threshold elements, the three-judge panel had no need to consider Appellants' "totality of the circumstances" evidence.

the complained-of districting method deprives the minority group of its ability to elect a candidate of choice:

> . . . if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure [(the electoral districting at issue in *Gingles*)] interferes with their ability to elect their preferred candidates. *Minority voters may be able to prove that they still suffer social and economic effects of past discrimination*, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, *but they have not demonstrated a substantial inability to elect* caused by the use of a multimember district. *By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that § 2 plaintiffs prove their claim before they are entitled to relief.*

478 U.S. at 49 n.15 (emphasis supplied). Thus, Appellants' claim that review by this Court is warranted based on Appellants' "totality of the circumstances" evidence, *see* Juris. Stmt. at 28, 30-31, is legally incorrect if Appellants failed to prove the three threshold elements under *Gingles*. As the three-judge panel correctly found, Appellants failed to meet their burden of proof.

A. The Three-Judge Panel Correctly Found No Violation Of The Voting Rights Act On The Challenged Cook County African-American Super-Majority Districts

At trial, Appellants isolated eight House and three Senate African-American super-majority districts in the approved Jourdan III-A plan which they alleged deny African-Americans in those districts a fair opportunity to elect a candidate of their choice.[5] The evidence presented at trial conclusively established that the Appellants have not shown a Voting Rights Act violation in these districts,

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5 The districts challenged were: House 5, 6, 21, 23, 24, 26, 27, and 28 and Senate 3, 12, and 14.

and the three-judge panel's decision is justified for two reasons: (1) Appellants failed to establish the Gingles threshold elements of a section 2 claim; and (2) the over-65% populations in each of the challenged districts is empirically adequate to give African-Americans in those districts the ability to elect candidates of their choice.

1. Appellants Failed To Prove Political Cohesiveness Among African-Americans In The Challenged Districts.

The second *Gingles* threshold element requires that the minority group be politically cohesive. In an attempt to justify their own Gardner Plan's district structure, Appellants claimed in their pleadings, before the three-judge panel, and even before this Court, that the African-Americans in the identified districts are not "politically cohesive":

> In the City of Chicago, where African-Americans experience differing economic circumstances, differing political agendas in local issues, differing local political organizations and, at the local level, differing political communities of interest, it is inappropriate to disregard those differences, engage in the incorrect assumption that all African-Americans and their communities are alike and force rival political organizations to compete for the African-American vote in primary elections . . .

Juris. Stmt. at 31-32. See Gardner C-Claim ¶ 32. These admissions of a lack of political cohesiveness mean that the second Gingles threshold element is clearly absent.

2. Appellants Failed To Prove Majority Opposition Bloc Voting In The Challenged Districts.

The third *Gingles* threshold element requires that whites in fact vote to block the preferred candidates of African-Americans. The Appellants completely failed to offer proof which satisfied this threshold element. After analyzing the eleven elections held over the past five years in which African-American candidates ran against white

candidates, Appellants' expert, Kimball Brace, admitted that African-American candidates in House District 26 carried the district in **all eleven** elections, that in seven of the challenged districts (House Districts 5, 6, 21, 27, 28 and Senate 12 and 14) African-Americans were able to have the African-American candidates carry the district in **nine** of the eleven races, while in the remaining three districts (House Districts 23, 24 and Senate District 3) the African-American candidates carried the district in **eight** of the eleven races. In each of these identified instances where the African-American candidates carried the district, Mr. Brace admitted that the African-American communities in the various districts were able to elect the candidates of their choice. Mr. Brace also admitted that there was no evidence of effective white bloc opposition voting in the 1987 City Treasurer Democratic Primary Election, 1987 City Treasurer General Election, 1987 Mayoral Primary Election, 1987 Mayoral General Election, 1989 Mayoral Democratic Primary Election, 1989 Mayoral General Election, 1990 Cook County State's Attorney Election, and the 1990 Attorney General Election. (Northern District of Illinois, three-judge panel, February 1992 Trial Transcript ("Tr.") at 253, 256, 258, 259, 262, 263).

Federal law requires evidence of a *"consistent"* degradation of voting power and proof of *"continued"* frustration of the will of the majority of voters, *Davis v. Bandemer*, 478 U.S. 109, 135 (1986) (separate opinion of White, J.) (emphasis supplied), and showing that the white voting bloc must *"usually* be able to defeat candidates supported by a politically cohesive, geographically compact minority group . . . ." *Gingles*, 478 U.S. at 48. "Usually" has been defined to mean "more often than not." *Williams v. State Bd. of Elections*, 718 F. Supp. 1324, 1328 (N.D. Ill. 1989). Therefore, a *history* or *pattern* of white bloc voting is necessary under the Voting Rights Act. Here, Appellants did not establish a history of white bloc voting; indeed, far "more often than not" the African-American candidates win in the challenged districts, and thus the *history* or *pattern* in these districts — i.e., what "usually" happens — is a *lack* of white bloc voting. Mr. Brace's attempt to point to one election where he claimed that African-Americans did not elect the candidate of their choice cannot satisfy the *Gingles* standard because "[r]elying on a single election to prove unconstitutional discrimination is unsatisfactory." *Bandemer*,

478 U.S. at 135 (separate opinion of White, J.); *see also Jenkins v. Red Clay Consolidated School Dist. Bd. of Educ.*, 780 F. Supp. 221, 231 (D. Del. 1991) ("Results from one election do not show that white voters usually vote in a way to defeat the black voters' choice of candidate.'") In short, Appellants' evidence failed to satisfy — and in fact proved the opposite of — the third *Gingles* element. Thus, Appellants' challenges to the eight House and three Senate African-American super-majority districts in Chicago failed to establish the threshold elements of a claim under the Voting Rights Act.

3. Appellants Failed To Prove Vote Dilution In That The Challenged Districts Are All Super-Majority Minority Districts In Which African-Americans Could Elect Candidates Of Their Choice.

The evidence at trial proved that in of each of the challenged African-American super-majority districts, the African-American community would be able to elect candidates of their choice. Appellants have admitted that each of the challenged Chicago districts is an African-American super-majority district with African-American population exceeding 65%. The challenged districts have the following populations:

District		African-American Pop.	%	African-American VAP	%
Senate	3	126,486	65.3	81,216	59.9
	12	129,481	66.8	83,813	63.7
	14	126,389	65.2	92,231	64.4
House	5	63,399	65.4	41,892	62.7
	6	63,087	65.1	39,324	57.2
	21	63,812	65.9	46,060	64.3
	23	63,233	65.3	42,293	62.6
	24	66,248	68.4	41,510	64.8
	26	70,507	72.8	48,509	72.4
	27	63,032	65.1	47,065	65.0
	28	63,357	65.4	45,166	63.9

Minority concentrations of 65% total population in a district provide the group with a reasonable opportunity to "exercise political control over that district." *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977); *Latino Political Action Comm. Inc. v. City of Boston*, 784 F.2d 409, 414 (1st Cir. 1986); *Hastert*, 777 F. Supp. at 647. The 65% figure is widely accepted in the field of redistricting as sufficient because a minority has sufficient voting strength to elect its candidate of choice and is a guideline used by the Department of Justice, reapportionment experts (including Appellants' expert Kimball Brace, *see Rybicki v. State Bd. of Elections*, 574 F. Supp. 1147, 1149 n.4 (N.D. Ill. 1983)), and the court considering the challenge to the United States congressional district reapportionment in *Hastert*, 777 F. Supp. at 647.

Appellants now complain of a "mechanical application of a bright-line test" based on this 65% rule. Juris. Stmt. at 31. They contend it does not account for low voter turnout or registration. Juris. Stmt. at 29-30. However, the 65% super-majority figure recognizes that minorities may have difficulty electing the candidate of their choice with a simple majority because of low voter turnout, low voting

age population, and low voter registration. To counteract these potential obstacles to voting power, the 65% number starts with 50% population to constitute a majority and then adds 5% additional population to counter the presumed affects of a young population, 5% additional population to counter the presumed affects of low voter registration, and 5% additional population to counter the presumed affects of low voter turnout. *See Ketchum v. Byrne*, 740 F.2d 1398, 1415 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). Thus, the 65% figure factors in the problems inherent in minority participation in the political process and protects the political power which might not be protected adequately with a simple majority. *Hastert*, 777 F. Supp. at 647; *Rybicki*, 574 F. Supp. at 1113 n.87. While the 65% figure is not etched in stone, no court has ever required a district to be configured to contain more than 65% minority population. Indeed, less than 65% may be sufficient to allow minorities to elect their candidate of choice. Yet, Appellants here seek a "double-counting"; they demand more population in the districts because of low voter registration and turnout when such factors are already built into the 65% total population figure applied in the challenged districts.

Significantly, a 65% African-American population in the areas comprising the very districts challenged by Appellants repeatedly has been held to be sufficient to allow African-Americans to elect the candidate of their choice. In *Hastert*, *Ketchum*, and *Rybicki*, the courts approved of the 65% figure when applied to these *same Chicago-area African-American voters* in the context of congressional redistricting, ward remapping for the city of Chicago, and the 1981 state legislative redistricting.

Perhaps the most significant evidence for the sufficiency of the over-65% total population in each of the challenged African-American super-majority districts came from Appellants' own expert, Kimball Brace. Mr. Brace admitted that the 65% total population standard is a rule of thumb used by courts in determining whether a minority group can elect candidates of their choice which may be raised or lowered depending on local circumstances. (Tr. 217-19, 221). Mr. Brace admitted that the 65% rule is based on the rough equation of 50% for a majority, plus upward adjustments of 5% for lower voting

age population, 5% for lower voter registration, and 5% for lower voter turnout. (Tr. at 217-19, 225-28).

On cross-examination, Mr. Brace admitted that the empirical data in this case shows that giving upward adjustments in population of 5% for lower voter registration, 5% for lower voting age population, and 5% for lower voter turnout gives *more* protection to African-Americans in the challenged districts than the empirical data suggests is required for each of these adjustment factors. *See* (Tr. 226-28, 284-87); *March 11 Opinion*, 786 F. Supp. at 712 n.7. Application of the 65% rule is therefore appropriate in Chicago and may even overstate the population totals needed to provide African-Americans the opportunity to elect candidates of their choice. Because each of the challenged districts has a total African-American population *in excess* of 65%, empirical data supports the finding that African-Americans will be able to elect candidates of their choice in each of the challenged districts.

Appellees' expert, Dr. Richard Engstrom, also provided expert testimony proving the ability of African-Americans in the challenged districts to elect candidates of their choice. After analyzing the electoral history in Illinois, Dr. Engstrom found that a super-majority district following the 65% rule provided African-Americans in Illinois the opportunity to elect a candidate of their choice (Tr. at 518-19), and that the districts challenged by the Appellants provide African-American voters a fair opportunity to elect a candidate of their choice (Tr. at 520, 536). Dr. Engstrom's opinion was based on the most recent eleven city, county, or statewide elections in which voters in these districts had a choice between or among African-American(s) and other candidates within the past five years. (Tr. at 520-21).

The results from these eleven elections show that the vote totals for the African-American candidate(s) in the challenged districts exceed the vote totals cast for other candidates in all but two elections. (Tr. at 521-31). In House District 26, the African-American candidate(s) won in *all eleven* of the elections. (Tr. at 528). The two aberrant elections, the 1991 Mayoral Democratic primary and general elections, were re-election races involving a particularly popular incumbent — Richard M. Daley. Dr. Engstrom determined that these races, on their own, do not erase the trend established by all of the

other elections over the past five years. (Tr. at 531). Rather, the results in the City Clerk's race in 1991, which involved very low voter turnout primarily as a result of the mayoral matchup, and also involved a white Democratic-slated candidate, showed that even with those impediments, African-American votes out-totaled white votes in all but two of the challenged House districts and one challenged Senate district. Significantly, even in those two House districts and one Senate district, the margin of victory was only several hundred votes. Thus, even in an aberrant election year, with voter turnout skewed by a particularly unique mayoral contest involving a very popular white incumbent mayor, African-American voters retained a *fair opportunity* to elect candidates of their choice in the challenged districts.

Thus, the evidence established that the African-American super-majorities in the challenged districts can elect candidates of their choice. This is clear not only from the 65% minority population existing in the districts, but from a historical analysis of the results of elections involving white candidates pitted against African-American candidates in the geographic area encompassed within the challenged districts.[6] As the three-judge panel concluded:

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6 Appellants complain that the three-judge panel did not analyze data they submitted at trial and that the three-judge panel's finding that Dr. Engstrom's testimony was better supported and better reasoned than Mr. Brace's was somehow insufficient. (Juris. Stmt. at 29). However, this case was a battle of expert opinion as to the *significance* of the raw data submitted to the Court, and the three-judge panel was well-informed about Mr. Brace's lack of credibility. In the 1981 *Rybicki* litigation, Mr. Brace — testifying in favor of the Democratic Commission Plan — opined that a redistricting plan which provided for only twelve African-American House districts and five African-American Senate districts was "racially fair" (Tr. at 294), while in this case, despite a *decline* in African-American population in the city of Chicago of approximately 109,000 since 1981 (Tr. at 293) — Mr. Brace criticized as "not fair" a plan which contains seventeen House districts and eight Senate African-American districts. In *Ketchum*, Mr. Brace supported a Democratic ward plan which divided a population of 50,000 Hispanics into two separate wards, testifying under oath that an 83% Hispanic population was not enough to create an effective district, and that splitting 83% population therefore was

> [Appellants] bore the burden of showing that the challenged districts did not comply with the Voting Rights Act. That burden was particularly heavy in view of the 65% or greater African-American majorities in each of the eight House and three Senate districts at issue. Increasing the African-American majorities in those districts would run the risk of diluting African-American voting strength through "packing," and thereby constitute a § 2 Voting Rights violation. . . . Based on the "totality of the circumstances," the [Appellants] have failed to show that the super-majority districts violate the Voting Rights Act in any respect.

March 11 Opinion, 786 F. Supp. at 713. The evidence supports the three-judge panel's conclusion that Appellants' claims concerning these African-American super-majority districts were without legal merit and were not supported by the evidence.

B. The Three-Judge Panel Properly Found That Appellants Failed To Establish A Voting Rights Act Violation For Downstate Minority "Fracturing"

Appellants presented evidence on several "downstate" cities or communities outside of Chicago — Aurora, Champaign, Leyden Township, Rock Island, Springfield, and Waukegan — in which they claim that African-American and/or Hispanic populations were not sufficiently combined into single districts so as to maximize their ability to "influence" elections.[7] The three-judge panel rejected

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not "fracturing" (Tr. at 321), while in this case, Mr. Brace opined that "splitting" only *843* African-American voters in Champaign and only *294* African-American voters in Springfield (in districts of 89,000 people) does constitute "improper fracturing." Finally, Mr. Brace admitted that the effect of the reconfigured downstate districts in the Gardner Plan he supported would be a net gain of "four or five" House seats for the Democratics. (Tr. at 393).

7 The Appellants abandoned their claims on Bloomington-Normal, Decatur, Elgin, Joliet, and Metro-East (East St. Louis) at trial.

these claims. *March 11 Opinion*, 786 F. Supp. at 716-17. The three-judge panel's conclusion is justified for several reasons.

1. "Influence" District Is Not A Recognized Concept Under The Voting Rights Act.

The argument for the existence of "influence" districts is little more than an attempt to ignore the express requirement of a majority in the first *Gingles* element. This Court has never required that a district be created with a minority voting age population of less than 50% for the purpose of maximizing that group's influence in an election. Appellants' claim for such a district is ultimately premised on a supposed recognition of "influence" districts in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) and dicta of this Court in *Chisom v. Roemer*, ___ U.S. ___, 111 S. Ct. 2354 (1991). Neither case supports Appellants' argument. First, the *Armour* court did *not* recognize the concept of an "influence" district as advanced by Appellants. In a footnote, the *Armour* court specifically noted:

> The plaintiffs . . . suggest that §2 of the Voting Rights Act may permit an action based on a minority group's "ability to influence" an election in an single-member district which is independent of that group's ability to elect a candidate of its choice. . . . *We need not reach the question of whether such an action may be viable under the Voting Rights Act* because we find that the plaintiffs have met their burden of demonstrating an ability to elect a candidate of their choice.

Armour, 775 F. Supp. at 1059 n.19 (emphasis supplied). Thus, *Armour* cannot be viewed as somehow endorsing the concept of an "influence" district. The minority "influence" district concept supposedly embraced in *Armour* has been rejected by other courts. *See DeBaca v. County of San Diego*, 794 F. Supp. 990, ___ (S. D. Cal. 1992); *Hastert*, 777 F. Supp. at 655. Several pre-*Armour* cases likewise expressly rejected attempts to invoke a section 2 claim with less than a majority. *See McNeil*, 851 F.2d at 947 (minority group constituting 50.2% of total population but only 43% of voting age population did not satisfy first *Gingles* element) *Skorepa v. City of*

Chula Vista, 723 F. Supp. 1384, 1391 (S.D. Cal. 1989). Indeed, the population numbers here are almost identical to those which were before the *McNeil* court.

The reason for the rejection of a below-50% voting age population threshold is simple: Without the bright line drawn by a majority requirement, it becomes increasingly difficult for courts to determine in any reasonable or uniform fashion whether injury has occurred to the minority group's voting power, *Hastert*, 777 F. Supp. at 653, while flooding the courts with marginal claims of dilution. *McNeil*, 851 F.2d at 947; *Hastert*, 777 F. Supp. at 653-55; *Skorepa*, 723 F. Supp. at 1391. A definition of minority influence district that has no limits as to voter group size "runs counter to the principle that 'no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength.'" *See Hastert*, 777 F. Supp. at 655 & n.33 (*quoting Mississippi v. United States*, 490 F. Supp. 569, 582 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980)); *Skorepa*, 723 F. Supp. at 1390 (26.1% of voting age population "far too low to meet the first [*Gingles*] precondition"); *see also Turner v. State of Ark.*, 784 F. Supp. 553, 570 (E.D. Ark. 1991) (statements of *McNeil* concerning need to show majority of voting age population "apply even more aptly to the single-member districts in question here").

Second, the Appellants' claim that the majority requirement in the first *Gingles* threshold element can be set aside for "influence" districts because of an "explicit recognition" of such districts in *Chisom v. Roemer*, ___ U.S. ___, 111 S. Ct. 2354 (1991), Juris. Stmt. at 27, is based on a complete misreading of a single footnote sentence in *Chisom*.

The *Chisom* court considered whether section 2 applied to state judicial elections. In finding that section 2 did apply, the majority opinion specifically *rejected* a construction of section 2(b) which would create a protected right to participate in elections *separate from* the right to elect representatives of the minority group's choice. The *Chisom* majority stated:

> Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome

> of an election. *As the statute is written, however,* the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. *The statute does not create two separate and distinct rights.* Subsection (a) covers every application of a qualification, standard, practice, or procedure that results in the denial or abridgment of "*the right*" to vote. The singular form is also used in subsection (b) when referring to an injury to members of the protected class who have less "opportunity" than others "to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. §1973 (emphasis [in italics] added [by Supreme Court]). *It would distort the plain meaning of the sentence to substitute the word "or" for the word "and." Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect.*

Chisom, ___ U.S. ___, 111 S. Ct. at 2365 (emphasis added). Thus, while recognizing that the ability to "influence" elections can be diminished, the *Chisom* court held that the statute requires *more* than a mere effect on the opportunity to participate which "influence" would provide; a section 2 violation occurs *only* when the opportunity to participate in the process *and* the opportunity to elect candidates of choice are *both* infringed. Indeed, immediately following this quotation, the *Chisom* majority emphasized that section 2 is patterned after this Court's precedent holding that the plaintiff's burden is to produce evidence that the minority group's members had less opportunity to participate in the political process *and* to elect legislators of their choice. *Id.* (*citing White v. Register*, 412 U.S. 755, 766 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)).

Justice Scalia dissented, arguing that small minority groups might not be protected under the majority's construction of section 2 because they will lack numbers sufficient to elect a candidate of their choice. In a footnote located at the end of the above quotation, the majority states that Justice Scalia's argument "rests on the erroneous

assumption that a small group of voters can never influence the outcome of an election." *Chisom*, ___ U.S. ___, 111 S. Ct. at 2365 n.24. Coming as it does at the end of a long discussion of section 2's language (which concludes that section 2 requires a showing of less opportunity to participate *and* denial of the opportunity to elect), this footnote language does not abandon the requirement of showing a denial of the opportunity to elect — a requirement which *Gingles* says is met by showing that the minority group constitutes a majority in the district. Rather, the footnote language simply responds to the dissent's argument that the "right" to participate in the political process will be unprotected, saying that voting (and therefore "influencing" an election) is participating in the election process. *Nothing* in the footnote (or the entire opinion) states that ability to "influence" an election is a separately protected right under section 2. *Nothing* in the footnote (or the entire opinion) states or even implies that ability to "influence" elections must be maximized when drawing election districts. *Nothing*, in short, comes even close to saying that "influence" districts are cognizable under section 2.

Thus, there is no legal basis for Appellants' claim that the Voting Rights Act requires that an "influence" district be created in downstate districts.

2. Appellants Cannot Satisfy The *Gingles* Threshold Elements As To The Downstate Minority Fracturing Claims.

The evidence presented before the three-judge panel proved that, empirically, none of the minority populations in the geographic areas challenged by Appellants could be grouped into a single district in which the group would constitute a majority of the voting age population so as to warrant Voting Rights Act protection. Perhaps the best evidence of this comes from the Appellants themselves. When given the opportunity to draw a map for the challenged downstate areas, the Appellants split up the minority populations in the challenged areas of Aurora, Bloomington-Normal, Champaign-Urbana, Decatur, Elgin, Joliet, Metro-East (East St. Louis), Rock Island, Springfield, and Waukegan in roughly the same percentages as does the Jourdan III-A Plan:

	Jourdan III-A District	Gardner District	Population Difference
AURORA			
	42	42	
African-	6,935	11,148	4,213
American	7.2%	11.5%	4.3%
	84	42	
Hispanic	20,007	24,408	4,401
	20.7%	25.2%	4.5%
CHAMPAIGN			
	42	42	
African-	11,529	12,372	843
American	11.9%	12.8%	.9%
ROCK ISLAND			
	72	71	
African-	7,560	9,008	1,448
American	7.8%	9.3%	1.5%
	71	71	
Hispanic	4,697	6,464	1,767
	4.8%	6.7%	1.9%
SPRINGFIELD			
	100	100	
African-	12,324	12,618	294
American	12.7%	13.0%	.3%

WAUKEGAN

	59	61	
African-American	20,839 21.5%	23,202 24.0%T2.5%	2,363

	59	61	
Hispanic	15,456 16.0%	19,645 20.3%	4,189 4.3%

LEYDEN

	77	77	
Hispanic	12,535 12.9%	15,853 16.4%	3,318 3.5%

Thus, it is empirically not possible to combine these minority populations into geographically compact single districts in which such populations constitute a majority so as to maximize their "influence." The first Gingles threshold element is clearly absent here.

3. The Evidence Failed to Prove Appellants' Theory Of "Influence" In The Downstate Districts.

Even if some theory of "influence" is cognizable under the Voting Rights Act, the Appellants have failed to offer credible evidence of the supposed "influence" they seek to maximize. The three-judge panel specifically found that the Appellants failed to show proof of the "influence" they claimed was being denied minority populations. *March 11 Opinion*, 786 F. Supp. at 716:

> [t]he evidence . . . does not clearly show that a 13.0% minority population in a Springfield district could be significantly more influential than the 12.7% provided for, or that a 12.8% minority would be significantly more powerful than 11.9% in a Champaign-Urbana district.

The Appellants' theory of downstate fracturing is unworkable. Apparently Appellants believe that *any* minority population not in-

cluded in a district constitutes a "fracturing" which violates the Voting Rights Act; Mr. Brace admitted that under his proposed interpretation, a census block of as small as *five* minority persons could give rise to a Voting Rights Act claim if split off from a district containing other minority population. (Tr. at 496-99). That simply ignores the reality of the geographic dispersion of minorities throughout the state. Indeed, taken to its logical conclusion, Brace's theory would require the map-drawer to draw gerrymandered districts containing relatively equal numbers of white Democrats and white Republicans so that small groups of minorities could "swing" an election. As Brace admitted, under his analysis, the Gardner Plan — which was supposed to "remediate" the alleged violations of the Voting Rights Act — itself violates the Voting Rights Act because it splits minority populations downstate in the same rough percentages as Jourdan III-A. (Tr. at 496-99). This self-condemnation underscores the legal bankruptcy of Appellants' claims.

The true motivation for Appellants' downstate fracturing claim becomes transparent when the political ramifications of the Gardner Plan are examined. While the Gardner Plan keeps minority communities split and makes only minor changes in concentration of minorities within the challenged downstate geographic areas (thereby "fracturing" those communities), the Gardner Plan's proposed changes in each of the challenged areas benefits the Democratic Party at the expense of the Republican Party. Mr. Brace admitted that the district line changes in the Gardner Plan would benefit the Democrats in the following way based on Mr. Brace's numbers:

	Repub. v. Dem. Jourdan III-A	Repub. v. Dem. Gardner Plan	% Shift to Dem. in Gardner
Aurora			
House 42	59.4% v. 41.6%	45% v. 55%	14.4
Champaign			
House 104	56.8% v. 43.2%	51.9% v. 48.1%	4.9
Rock Island			
House 71	44.4% v. 56.6%	39.8% v. 60.2%	3.6
Springfield			
House 100	53.2% v. 46.8%	51.1% v. 48.9%	2.1
Waukegan			
House 61	60% v. 40%	39.6% v. 61.4%	21.4

(Tr. at 371, 375-90). Overall, the Gardner Plan would switch five or six House and three Senate seats from Republican to Democrat. (Tr. at 388, 391, 393). In effect, Mr. Brace, who testified in the Commission hearings that Jourdan III-A was politically unfair and supported a Democratic-biased plan (only to have the Commission and the Illinois Supreme Court reject his claim), was seeking to alter the political balance of the map under the guise of helping minorities avoid "fracturing." The three-judge panel correctly rejected this political agenda.

Given the legal and factual insufficiency of Appellants' claims, the three-judge panel correctly rejected the downstate "fracturing" claims.

C. The Three-Judge Panel Correctly Found No Violation Of The Voting Rights Act On The Hispanic "Influence" District On Chicago's Northwest Side

Appellants' third challenge to the three-judge panel's decision is the failure to recognize Appellants' claim that Jourdan III-A vio-

lates the Voting Rights Act in its configuration of House District 33, the so-called Hispanic "influence" district on the northwest side of Chicago. Juris. Stmt. at 27, 33-35. According to Appellants, the district can be reconfigured so that Hispanics are 50% of the total population and 44.3% of voting age population, rather than the 39% total population created in Jourdan III-A.

As an initial matter, it is important to note the chronology of events which preceded the creation of House District 33 in Jourdan III-A. In Jourdan II, an earlier plan approved by the Commission, the Hispanic super-majority House Districts 3 and 4 had 66.5% and 67.1% total populations, respectively, and House District 12 had 46.6% Hispanic total population. Senator Miguel del Valle, whose new district would encompass House Districts 3 and 4, complained that the total populations in House Districts 3 and 4 were too low based upon the affidavits of Dr. Gordon B. Henderson, who opined that Hispanics needed 70% population in order to be able to elect candidates of their choice in House Districts 3 and 4. In response to Senator del Valle's objection, Jourdan III-A increased the Hispanic population to slightly above the 70% that Dr. Henderson claimed was necessary, thereby reducing the population which could be combined into what was to become House District 33. In short, House District 33 became a 39% Hispanic district because of the need to protect the Hispanic super-majority House Districts 3 and 4.

In this case, the Appellants advanced two differing theories on House District 33: (1) that House District 33 (as reconfigured by Appellants' competing reapportionment Plan) was one in which the Hispanics could elect a candidate of their choice, see Tr. at 507 (Brace testimony); at 735, 756-57 (Henderson testimony); and (2) that House District 33 is an "influence" district — i.e., one in which the minority population can "swing" an election. Under either theory, Appellants have not established a Voting Rights Act claim.

1. The Three-Judge Panel Correctly Found That Appellants Failed To Establish That Hispanics In House District 33 Could Elect Candidates Of Their Choice.

The three-judge panel held that Appellants failed to provide sufficient evidence to show that Jourdan III-A's House District 33

denies Hispanics the ability to elect a candidate of their choice. As a preliminary matter, Appellants' own plan could only create a district with a 44.3% Hispanic voting age population, far below the majority which would guarantee an ability to elect candidates of their choice. *See McNeil*, 851 F.2d at 947 (failure to have a voting age population majority precludes a section 2 claim).[8]

Appellants' assumption that a 50% Hispanic population equates with an ability to elect a candidate of Hispanic's choice is belied by historical data. Dr. Engstrom testified that House District 10 of the 1981 plan in the same area was 50% Hispanic yet elected Anglo representatives despite the pronounced tendency of Hispanics to vote for Hispanic candidates. (Tr. at 711, 714-16). Further, Appellants' own expert, Mr. Brace, testified that even under the Gardner Plan, Hispanics would have to "coalesce with the white community or some part of the black . . . or Asian community" in order to be able to elect candidates of their choice (Tr. at 507), and that such political coalitions are possible (*id.*). Dr. Gordon Henderson, appearing on behalf of Hispanic challengers to Jourdan III-A, likewise testified to "coalitional" voting in Senate District 2. (Tr. at 728-30). The admitted fact that Hispanics need to form a coalition contradicts the claim that Hispanics can elect candidates of their choice. The panel was therefore justified in stating in the *March 11 Opinion*: "[t]he record, as well as the general 65% guidelines, suggest that the Hispanic voting age population must be substantially higher than 44.3% to provide such an opportunity [to elect candidates of choice]." 786 F. Supp. at 714.

2. The Three-Judge Panel Properly Rejected Appellants' Claimed Voting Rights Act Violation For An "Influence" District.

The Appellants also claim that House District 33 should have been reconfigured to be an "influence" district, and that the failure of Jourdan III-A to maximize Hispanic influence in House District 33

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8 Appellants argue that *McNeil* does not apply because it concerned multi-member or at-large districts. This attempt to distinguish *McNeil* fails because the plaintiffs in *McNeil* were arguing *for* single-member districts.

violates the Voting Rights Act. The three-judge panel rejected Appellants' "influence" district claim on legal and factual grounds. *March 11 Opinion*, 786 F. Supp. at 715-16. As explained above, there is no legal basis for an "influence" district claim under the Voting Rights Act. Thus, Appellants' claim on House District 33 is legally deficient. The three-judge panel's decision is justified for two additional reasons: (1) Appellants fail to meet the *Gingles* threshold elements; and (2) the Gardner Plan's House District 33 impairs Hispanic voting power.

(a) Appellants Have Failed to Satisfy the *Gingles* Threshold Elements

As noted above, the Appellants cannot establish that Hispanics in House District 33 can be grouped together to form a majority of the voting age population in a single district. Thus, Appellants cannot satisfy the first *Gingles* threshold requirement. Furthermore, the Appellants did not establish the third *Gingles* threshold element of white bloc or polarized racial voting in House District 33. In fact, Appellants' expert, Mr. Brace, testified that Hispanic voters integrate well with the white community on the northwest side of Chicago (Tr. at 137), and that Hispanics in District 33 would have to *and could* form political coalitions with whites in order to elect candidates of their choice (Tr. at 507). Dr. Henderson's analysis echoed this recognition of the presence and need for "coalitional" voting. (Tr. at 728-30). The claim that minority voters can form coalitions with whites "not only ignores the need to prove under *Gingles* that polarized voting prevents this from happening, *but it directly undercuts their section 2 claim* by showing that even absent a majority they could elect candidates of their choice if they sought alliances and coalitions with other voters in the traditional political manner. *If this is true there is no need for, or legal basis for, a section 2 claim.*" *Turner v. State of Ark.*, 784 F. Supp. at 571 (emphasis supplied). The failure to satisfy the *Gingles* threshold elements justifies the three-judge panel's rejection of Appellants' "influence" district claim.

(b) The Appellants' Gardner Plan House District 33 Impairs Hispanic Voting Power

While the Appellants cannot establish a section 2 claim, their proposed "remedy" — Gardner Plan House District 33 — actually would *impair* Hispanic voting power in other districts more than the supposed increase in "influence" in one district. Gardner Plan House District 33 purported to create a 50.0% total population/44% voting age population Hispanic district. To obtain the Hispanic population necessary to reconfigure House District 33, however, the Appellants reduced the population of Hispanic super-majority House Districts 3 and 4 (Senate District 2):

	JOURDAN III-A		GARDNER	
District	Total Pop./%	VAP %	Total Pop./%	VAP %
03	69,038	42,332	65,945	40,639
	71.3%	67.3%	68.1%	63.1%
04	68,275	41,480	65,887	40,105
	70.5%	64.9%	68.0%	63.1%

The evidence supported the creation of Hispanic districts with 70% total population to ensure Hispanics an opportunity to elect the candidates of their choice. To create their proposed House District 33, Appellants would decrease the population of two districts — House District 3 and 4 — below this critical 70% level. Appellants would thereby jeopardize Hispanic voting strength in House Districts 3 and 4. That is an unacceptable (and unnecessary) trade-off under the Voting Rights Act. The three-judge panel noted this fact: "There is no evidence that the 33rd House District could be given an Hispanic voting age majority while retaining the Hispanic super-majority status in the 3rd and 4th Districts." *March 11 Opinion*, 786 F. Supp. at 714.

Therefore, House District 33 as configured under the Jourdan III-A plan complies with the Voting Rights Act because it protects Hispanic interests in neighboring super-majority districts and because there is no legal justification under section 2 requiring the increase in

population concentration sought by the Appellants. Thus, the three-judge panel was justified in ruling against Appellants on the northwest side Hispanic "influence" district claims.

II. THE THREE-JUDGE PANEL PROPERLY DENIED THE APPELLANTS' CHALLENGES UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS IN UPHOLDING THE JOURDAN III-A PLAN

Racial gerrymandering violates both the Fifteenth Amendment, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and the Equal Protection Clause of the Fourteenth Amendment, *Reynolds v. Sims*, 377 U.S. 533 (1964). A plaintiff must show both discriminatory intent and discriminatory effect as essential elements in order to state a claim for relief under the Equal Protection Clause of the Fourteenth and Fifteenth Amendments. *Davis v. Bandemer*, 478 U.S. at 127 (separate opinion of White, J.); *City of Mobile v. Bolden*, 446 U.S. 55, 62-68 (1980); *Ketchum v. Byrne*, 740 F.2d 1398, 1406 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

While proof of discriminatory intent may be inferred when the circumstances justify the conclusion that invidious discrimination was more likely than not a motivating factor in the redistricting decision, *see Bolden*, 446 U.S. at 70-74, the mere showing of awareness that a decision would affect a minority group is not sufficient: "'Discriminatory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Bolden*, 446 U.S. at 72 n.17 (*quoting Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1970)). Rather, the plaintiff must show that the purpose was "to minimize or cancel out the voting potential of racial or ethnic minorities . . . [and] that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.'" *Bolden*, 446 U.S. at 66 (*quoting Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)). Discriminatory effect requires a showing that the affected groups have "less opportunity to participate in the political processes and to elect candidates of their choice," *Bandemer*, 478 U.S. at 131 (separate opinion of

White, J.) (*quoting Rogers v. Lodge*, 458 U.S. 613, 624 (1982)), or that the plan "fences out a racial group so as to deprive them" of their vote, *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973). Discriminatory effect is *not* shown by way of speculating as to the proportion of seats the group may garner or by the fact that winning elections might be more difficult under the new redistricting plan. *Bandemer*, 478 U.S. at 130-32 (separate opinion of White, J.); *Bolden*, 446 U.S. at 66.

The three-judge panel found that Appellants have failed to offer any proof of discriminatory intent in the drafting of Jourdan III-A or discriminatory effect in the operation of Jourdan III-A sufficient to establish a claim under the Fourteenth or Fifteenth Amendments. *March 11 Opinion*, 786 F. Supp. at 717. Appellants claim that the three-judge panel did not explain how Appellants failed to meet their burden of proof. Juris. Stmt. at 38. In effect, Appellants believe that they are entitled to review simply because *they* believe they proved intent.

Appellants' claim that they proved discriminatory intent by showing that the Commission was informed (by Appellants) that the Jourdan III-A plan was discriminatory, and the Commission did nothing about it. Juris. Stmt. at 38. The critical premise to this argument is that the plan is in fact discriminatory; the Illinois Supreme Court and the three-judge panel found, however, that the Jourdan III-A plan does not violate minority voting rights under state constitutional and Voting Rights Act principles, respectively. It is difficult to see how the promulgation of a legally sufficient reapportionment plan which protects minority voting rights evidences an intent to discriminate against minority voting rights. The three-judge panel's finding of no discriminatory intent makes eminent sense and needs no further explanation unless and until Appellants can articulate how discriminatory intent is present despite two judicial approvals of Jourdan III-A. No such explanation is attempted in the Jurisdictional Statement, and therefore there is no need for further review by this Court.

III. THE THREE-JUDGE PANEL PROPERLY FOUND THAT THE RESULTS OF THE MARCH 1992 PRIMARY ELECTION DID NOT PROVIDE AN ADEQUATE BASIS FOR A NEW TRIAL

As a final basis for review, Appellants allege that the three-judge panel erred when it failed to order a new trial after the March 17, 1992 Illinois primary election because, Appellants contend, "the results confirmed appellants' claim that African-Americans would not have a fair opportunity to elect candidates of their choice." Juris. Stmt. at 24. How or why the election results "confirm" Appellants' claims is never explained.

Although the Appellants at trial claimed that African-Americans could not elect a candidate of their choice in eight House and three Senate Districts, their Motion for New Trial cited only three House districts (Nos. 23, 24, and 28) and one Senate (No. 12) in which white candidates prevailed over African-American candidates in the March 17 primary. In denying the Motion, the three-judge panel described the Appellants' failure of proof as follows:

> The cited primary results establish, at most, that African-Americans' chosen candidates were not guaranteed election. That is clearly insufficient under both the Voting Rights Act, 42 U.S.C. § 1973(b) — "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population" — and the 14th Amendment equal protection clause. City of Mobile v. Bolden, 446 U.S. 55, 75-77, 100 S.Ct. 1490, 1504-05, 64 L.Ed.2d 47 (1980) (right to equal participation group from electoral defeat). The primary results do not show that African-Americans in the cited districts were denied a meaningful opportunity to elect their chosen candidates.

792 F. Supp. at 1112. The three-judge panel's decision is justified by the facts and law.

First, the results of a single election cannot establish a Voting Rights Act cause of action. "Relying on a single election to prove unconstitutional discrimination is unsatisfactory." *Bandemer*, 478

U.S. at 135 (separate opinion of White, J.); *see Jenkins v. Red Clay Consolidated School Dist. Bd. of Educ.*, 780 F. Supp. 221 (D. Del. 1991) ("Results from one election do not show that white voters usually vote in a way to defeat the black voters' choice of candidates."). Evidence of a "*consistent*" degradation of voting power and proof of "*continued*" frustration of the will of the majority of voters is required to support a claim. *Id.* Thus, the mere fact that some minority candidates lost in a *single* election cannot under federal law establish the requisite showing of a "consistent degradation" or "continued frustration of the will of the voters." More than one election is necessary for such a showing.

Further, the major underlying premise of the Appellants' arguments appears to be that African-American super-majority districts must elect African-American candidates or else the Voting Rights Act is violated. The Voting Rights Act, however, does *not* stand for the proposition that a super-majority district must produce candidates of the same race as the super-majority. Neither the Voting Rights Act not the Equal Protection Clause of the Fourteenth Amendment require proportional representation. *See* Voting Rights Act, 42 U.S.C. § 1973 ("nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"); *Bolden*, 446 U.S. at 75 (1980) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization"). Thus, Appellants' claims are not supported by the law.

Second, the results from the 1992 primary elections for the Illinois House and Senate do not establish the allegations made by the Appellants. Of the twenty-five Chicago-area African-American super-majority districts (Senate and House) in the redistricting plan approved by the three-judge panel, African-American candidates were victorious outright in the primary in eighteen such districts.[9] In four others (House Districts 24, 25, and 29, and Senate District 12), the cumulative vote totals for minority candidates exceeded the

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9 In addition, Hispanic candidates were elected in all of the Hispanic super-majority districts under the current plan.

cumulative vote totals for white candidates. Rather than "degradation" of voting power or "frustration of the will of the voters," these results indicate the effectiveness of the plan and belie Appellants' claims.

Indeed, it is difficult to interpret the March 17 primary results as "confirming" much of anything about Appellants' claims in the trial court. The Motion for New Trial cites only four of the eleven African-American super-majority districts challenged at trial, and in two of those four districts the African-American candidates received more votes than the white candidates. That works out to an **18% rate of accuracy** for Appellants' predictions at trial (assuming that African-Americans in the remaining two districts did not elect candidates of their choice -- a fact which Appellants claimed but never offered to prove). The four Chicago districts cited in Appellants' Motion for New Trial offer no proof of a frustration of "influence" of Hispanic voters in House District 33 or the downstate minority populations in Aurora, Champaign, Rock Island, Springfield, Waukegan, or Leyden Township. Quite simply, Appellants' claim of a "confirmation" of its theories at trial is a gross overstatement.

Further, the March 17 primary results undermined a central tenet of Appellants' theory. At trial, Appellants alleged that the challenged Chicago African-American super-majority districts contained "powerful white Democratic ward organizations" that would be able to target and defeat African-American candidates. The example offered was that of the allegedly all-powerful 11th Ward Democratic Organization which Appellants claimed would be able to field white candidates and prevail in the corresponding African-American super-majority Senate and House districts. However, under the approved Jourdan III-A plan, African-American women defeated white Democratic incumbents in districts encompassing significant portions of the 11th Ward Democratic Organization.

In short, neither the law nor the facts required a new trial on the basis of the March 17, 1992 Illinois primary. The three-judge panel was justified in its denial of Appellants' Motion for New Trial, and its *June 11, 1992* opinion should be affirmed.

CONCLUSION

Based on the foregoing arguments, the Appellees respectfully request that this Court dismiss this appeal and/or affirm the March 11 and June 11, 1992 rulings of the three-judge panel below.

Respectfully submitted,

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